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BOSTON PRISON DISCIPLINE SOCIETY.

Although the subject of prison discipline is intimately connected with criminal jurisprudence, and, therefore, is a legitimate topic of remark in a law journal, we have never been able to devote much attention to it in these pages, inasmuch as a full investigation of the different systems would have occupied more space than we were able to devote to any one subject. But the attention of our immediate neighborhood has recently been somewhat excited by circumstances to which we will briefly allude. The Boston Prison Discipline Society has been established many years, and we believe it is universally admitted, that it has been the means of vast good to convicts and to society in general. Nor has it been neglected by the public. The society has received, since its organization, large sums of money, which have been paid to its secretary, to other clergymen, and for printing the annual reports. It is well known, that this society has been a strenuous advocate of the Auburn or congregate system of prison discipline, in opposition to the Pennsylvania or separate system. In relation to these two systems, we do not propose to enter into any discussion at present, although we confess that our prepossessions are strongly in favor of the former, which the society has defended with so much zeal and ability. But we desire to direct attention to another subject, namely, the conduct of the Boston society, and the manner in

which the peculiar opinions entertained by its secretary have been maintained.

The doctrines of the society have usually been unquestioned in New England, and no little surprise was manifested at the annual meeting last year, when Mr. Charles Sumner and Dr. S. G. Howe ventured to call them in question, and to propose a committee of investigation. The result of that investigation was two reports, one in favor of the Auburn, and one in favor of the Pennsylvania system. These reports the society, at its business meeting this year, consisting of some dozen members, *voted not to print*, for want of funds; and they also voted that it was not expedient to discuss the subject at the public meeting. Notwithstanding this vote, after the secretary had submitted his annual report, at the public meeting of the society, Mr. Charles Sumner, an officer of the society, addressed the chair, when the secretary, with an assurance which could not but surprise his own friends, interrupted him by saying: "Mr. President, the annual meeting was interrupted in this manner last year; there are gentlemen present, who are invited by the committee of arrangements to address us." From which it would seem, that the addresses at the public meetings of this society are all cut and dried beforehand — made to order; a fact that might as well have been kept back, under the circumstances, for the credit of all concerned. Mr. Sumner, however, proceeded, in a strain of great eloquence and power, to condemn the course which the society had pursued in past years, illustrating his points by facts which are by no means creditable to the society; averring, among other things, that the statements contained in the annual reports had been pronounced false by public reports in this country and in Europe, and that a letter from the Hon. William Jay, an honorary vice-president of the society, and also a letter from Dr. Bell, a corresponding member, in favor of the separate system, had both never been read to the society nor published. Amongst other authorities referred to by Mr. Sumner, was an extended review of the reports of the society, in a recent German work, by Varrentrap. This review is a patient and careful investigation of the whole subject, by an intelligent foreigner; and we have thought that we could do no better service than to print a translation of it in our journal. At the same time, we take occasion to repeat, that we do not agree with all the conclusions of the writer; for we are not ready to admit that the prison discipline, which has been so successful in New England, is founded in essential error. But we regard the article itself as worthy of the attention of the friends of humanity, and especially of jurists, in every part of our country.

The review to which we refer is by Dr. Varrentrap, of Frankfort on the Maine, and is published in *Jahrbücher der Gefängnisskunde und Besserungsanstalten*, (Annals of Prisons and Houses of Correction.) The writer commences by speaking in praise of the practical direction which the subject of prison discipline has taken in America, but, at the same time, and in the German fashion, laments the want of scientific character of our efforts; asserting, that there is to be found, in the later American writings, "neither generous, comprehensive, light-diffusing discussions of the fundamental questions, nor (indeed much less) a bold examination of numerous facts, compiled with industry and exactitude." He then enters upon an examination of the Boston Prison Discipline Society, to which the present article relates exclusively:—

The Boston Prison Discipline Society was founded in the latter part of June, 1825, by a number of citizens interested in the condition of prisons. The object of it is, as the first report announces in a multitude of high-sounding words, with many scripture phrases of an utterly irrelevant character, 'the improvement of prisons.' This long train of words is, in itself, of little importance; indeed, we are quite accustomed to find it in the generality of American writings. Here, however, it has been prejudicial, inasmuch as, amidst all these sounding phrases, the founders (or at least the writer of the report) have entirely omitted to specify, even in a word or two, the manner in which they intended to accomplish their object; whether through scientific instruction, through influence exerted upon the various official departments of state, or through visits made to the prisons and prisoners, or through protection and counsel extended to discharged criminals, &c. Of all this, one finds nothing said. In this respect, the lately founded New York society has acted more wisely and logically. That which is not proposed with clearness, is rarely carried out with consistency.

The difference between the efficiency and power of performance of the Boston and the older Philadelphia society are to be traced principally to their original composition. The Philadelphia society, composed of a number of upright philanthropists, took upon itself to visit, console, and assist the prisoners, while it sought, at the same time, to give information concerning the aims and the methods of obtaining good prisons. The society was at first very efficient; but, gradually, as the most active members resigned, or were removed by death, it gave but seldom signs of life. With the exception of a visiting committee in continued operation, and the distribution of copies of the official reports of the Philadelphia prison, the last token of activity given by it was an exceedingly well-written report in the year 1833. Now, new life has sprung up in the society, partly called out by the violent attacks made upon the Philadelphia prison in the annual reports of the Boston society.

The Boston society had, on the other hand, from the very first, a salaried officer, namely, a secretary. Its activity, therefore, in so far at least as implied by the regular appearance of its annual report, was of a more methodical character. It is, indeed, through this alone that the whole efficiency of the society is recognizable; no member, save the secretary, undertaking or accomplishing anything, except the payment of a yearly subscription. There is no question of visiting committees, of protective unions. At first, provision was made for the payment of several prison preachers; now, only for the payment of a secretary,

whose duties chiefly consist in making an annual report, composed of abstracts of the various official reports presented by the various prisons, and thus contributing to a general knowledge of the condition of prisons in America. In the yearly meetings, also, no profound discussions of single important questions have taken place.

In order to estimate rightly the means which have been at the society's disposition, we have arranged the income and expenditures of every year under different heads, according to the account of them. We find from these that, during the nineteen years of its existence, the society has received $58,150. Of this sum, $37,500 consist of yearly subscriptions and donations; $1900 have been realized from the subscriptions of life members; $4160 have been collected by the agent, Mr. Barrett, principally during his journey in the southern and western states; $1500 by other collections; $1330 by the sale of Reports; $1130 for the same from the state governments, of which $630 from Massachusetts, Maine $100, New York $350, and Connecticut $50; $735 of interest have been received; $2400 have been paid back by the governments of Massachusettts ($1450) and Connecticut, being moneys lent at an earlier period for the payment of prison chaplains. The expenditures amount to about $56,800, namely, $27,000[1] for the support of the secretary; $8420 for that of settled clergymen, or in payment of occasional sermons, as follows: in Trenton, from 1826 to 1829, $300; in Boston, from 1826 to 1832, $1200; in Auburn, from 1825 to 1837, $2670; in Sing Sing, from 1827 to 1831, $638; and in Wethersfield, from 1831 to 1840, $3620. A small part of the remainder has been appropriated to travelling expenses, the chief part, however, to the printing of the annual reports.

In the further consideration of the achievements of this society, we must, as we have already said, direct our attention especially to their annual reports. That which has been accomplished by the chaplains in the pay of the society, however beneficial it may have been, is yet of such a nature as to admit of no positive demonstration. So much, however, appears to us in many parts of the reports, that the society, like many others in North America, was rather too well satisfied of the meritoriousness and praiseworthiness of its operations, if the gospel was only preached, and the Bible distributed.

The author then proceeds to give a particular account of each of the annual reports of the Boston Society, in the course of which, he does justice to the efforts made to abolish imprisonment for debt, and to provide for the insane. He seems to regard the first reports as the most carefully prepared and useful, and occasionally speaks with severity of the *manner* in which the secretary has performed his labor. Witness the following curious criticism: —

He (the secretary) throws out the opinion, "that, for manslaughter, arson, treason, highway robbery, or duelling, when resulting in the simple loss of life, the penalty of death should be abolished. In all cases, however, where the crime brings with it the evidence of intentional murder, we believe that the punishment desired [intended] by God is death. 'Whoso sheds man's blood, by man shall his blood be shed.' (Genesis.) Any further representation of the advantages or disadvantages of the death penalty, seems to Mr. Dwight quite unne-

[1] The annual salary of the secretary was at first $1000; but, gradually rising, it has been, since 1838, as high as $1700. Ed.

cessary after the opposing quotation of this single passage of the Bible. We will anticipate the course of our remarks a little, by making the following extract from the 10th report: 'In considering events like this, (a man in Wethersfield, condemned to perpetual imprisonment for an attempt to poison, had murdered another prisoner, locked up in the same cell with him,) the command of God appears to us holy, just, and good: whoso sheds man's blood, by man shall his blood be shed." To us on this side of the ocean, there seems to be something very original in this manner of understanding the Bible, which asserts that it is God who desires the shedding of human blood, or who commands the destruction of a whole people, only because the writers of the Old Testament, from their point of view, and in their way of judging, chose to put in the mouth of God the expression of feelings so unloving, so directly in opposition to the doctrines of the New Testament. Not less singular is the ending of this seventh report, in which the chapter, entitled 'Conclusions,' (p. 72–74,) is divided under the following heads: '*imprisonment for debt; Sunday schools; the Bible; the clergy in prisons; the mediate influence of this society; improvement of prisoners; our Lord Jesus Christ.*' Strange, yes, even unbecoming, does it appear to us, thus to place the name of Jesus Christ as the superscription of the last of the disconnected heads, which constitute the 'Conclusions.' That which is contained under this head amounts verbally to this: 'Our Lord Jesus Christ. He is our leader. He has given us an example. His word is our pledge [security], his promise our reward, his spirit the great aim of our prayers, his plan of salvation for poor sinners, the great object of our worship and our praise.' Such a conclusion, taken in connection with that which precedes, seems really *banale*, and the expression of spiritual pride, rather than of genuine, humble Christian piety, and true love of one's neighbor. If these writers, who wish especially to represent the pious, would but, in their mode of representation, take example by Christ, whose teachings were, through their very simplicity and truthfulness of expression, so overcoming, so victorious, then could such flourishing bombast (found by us, unhappily, also here and there in German reports on the poor and on prisons) no longer so conceal the plain truth, and not give itself the appearance of self-conceit.

We are reluctantly obliged to omit, for want of room, this critical examination of the several reports, and must confine ourselves to the statement of the general results to which the writer arrives.

One sees, that these nineteen yearly reports have taken, for their theme of discussion, highly important subjects; they have, particularly in the first years, collected much material; and extracted it, at first, partly with industry and selection. They have spread much information in regard to imprisonment for debt (and its amelioration) and matters relating to the insane, and have evidently exercised, also practically, an essential influence. In regard to the arrangement of penitentiary institutions, however, they seem to have been without any practical effect. The circumstance, that there are in North America, more penitentiaries after the Auburn than after the Philadelphia model, has certainly no connection with an influence, which the Boston reports may perhaps have exercised in this respect; but may evidently be ascribed (as appears from all the official documents) above all to the circumstance, that in America, a greater stress than upon all other considerations (as upon preventing corruption, reformation, etc.) is laid upon the greater income for the state, which, (the wages for work being high in America) the Auburn institutions promised to yield, and have,

in fact, yielded; because many of them are carried on particularly in consideration of the high profits of labor, and indeed many are let altogether to the highest bidder, or the superintendent receives a large salary in proportional percentage from the profits of labor, or even gives the state a certain sum, for which he then can make the prisoners work as much as he chooses, and thus makes a considerable gain for himself, and is the best paid officer in the whole state. In places also where the Philadelphia system was once introduced, these reports have exercised no influence in their tendency. But we believe that they have been, proportionally, of little use in theoretic or scientific respect, and, moreover, in Europe perhaps (where it was not known that they contain only the opinions of the secretary, but not that of a large society) they may have done harm with persons less informed, by spreading abroad mutilated facts and incorrect views. We must, therefore, consider, having first given a brief statement of their contents, whether these reports have at all performed, or striven to perform, what might be expected in the course of two decades of years, and with unusually large means of money.

The nineteen yearly reports (from 1826–1844) lying before us, occupy a space of 1870 octavo pages; each yearly report is hence, on an average, about 98 pages long. When we now consider, that, with the exception of the already mentioned salaries of clergymen, the whole remainder of the expenses has been chiefly devoted to those yearly reports, we cannot but find the yearly, returning expense of $2000 to $2500 per 100 octavo pages, which are, or pretend to be, for the most part, copies of official reports, enormously high. Nay, we are compelled to consider it, particularly by the mode in which the reports are drawn up, a horrible waste of money, which can be explained only by the consideration that the persons in Boston, on the one hand, never thus analyzed the expenses and the performances, and on the other hand, that they wished, above all other things, to give to the secretary, Mr. Dwight, a subsistence. This opinion we must, according to our conviction, state the more decidedly, because those reports do not contain a single extensive and connected original article of the secretary, but only single passages of the printed official reports of the different American penitentiaries, here and there accompanied with some reasoning remarks, which are not, however, the result of a more extended study.

We should think that with far less means, such an half-official society, might have obtained all the yearly reports of the North American penitentiaries, from which, by a man conversant with the subject, extracts might have been made with sensible selection, and, above all, with honesty, and carefully giving facts and figures, and thus the many materials which are otherwise accessible only to few, might be brought to the knowledge of many persons. This might have been attained with about as many hundreds of dollars, as thousands have now been expended, without attaining this. For it is a truly melancholy but undeniable truth, which must present itself to any one who has studied these reports attentively, thoroughly, and comparing them with the pages of official documents, that these dear reports are not complete, not reliable, and not candid extracts of official documents; they are only a selection of certain passages, of certain reports and from certain years, extracted with a onesided party view, according as they were calculated, to serve a certain purpose.

The reports have never been *complete* enough, to enable the reader to study by *himself* the results of the different institutions year after year, and to form an opinion of his own. They are most complete, it is true, during the first years, and then it happens, that one receives a faithful and living picture of the course of some institutions for certain years. But even in this respect, they are in the

early years deficient in many points; as in the one year, the extracts principally relate to the relapses, and in the other year, to the influence of religious instruction, (and then they pass almost entirely over the subject treated of in the preceding year) etc.; but the institutions are never discussed in a uniform manner several years in succession. This is especially the case in regard to positive facts and numbers (receptions, deaths, etc.) so that it is impossible, from the whole of the Boston yearly reports, to make for one's self a complete table of receptions, pardons, deaths, etc., even for a single penitentiary. With the exception of Auburn on which there is in the 13th report (p. 110) a pretty complete table, which is made by the clergyman there, and reaches to the year 1837, there could not be made for *any* institution, more than the tenth part of a table, like the one which we have furnished in volume VI, on Philadelphia. As to some institutions there can be extracted hardly ten figures from all the reports. However, the first reports differ yet very much from those of a later period, as we have already mentioned; the more abundant the later ones grow in errors and often verbally repeated personal diatribes, the poorer they grow in facts affording true interest. We have mentioned reports in which only the table occupying but *half* a page can be called truly instructive, and besides this, such tables are also so badly made up, that the simplest and most necessary points, as the number of prisoners received during the year, and the average number of prisoners daily attended to, are not mentioned at all. This reproach, of the grossest incompleteness, weighs the heavier upon the Boston reports, since with a little accurary and industry, good and complete extracts might have been furnished, as the chapter on the subject of insanity in the different reports, furnishes the proof, that Mr. Dwight is competent to such a labor if he chooses to do it.

The reports are *as little to be relied upon* as they are incomplete. The facts and extracts furnished by Mr. Dwight have lost their value, mainly because he has for the most part only reported what served to prove the one or other proposition on which he would treat, and because the inferences drawn are stated, but the facts from which they are drawn, are never completely communicated, so as to enable a person to supervise the correctness of them, or to draw an inference himself. And besides many of them, proceeding from a false point of view, are erroneous or directly untrue. These faults are repeated in each report innumerably often, nay almost in every question treated by him to a certain degree. It would occupy much space to prove it in individual cases where it regards views. We will therefore dwell for a moment, rather on some numerical statements, where it can be done shorter, and for example, commence with page 48 of the 14th report. Here are stated 199 receptions, in Philadelphia, during the year 1837, but it must be 217; also there are stated 9 deaths in Wethersfield, instead of 4, as may be read in the same report page 36; on the same page it is said, that at the end of the year, 187 prisoners had remained in Wethersfield, but in the 13th report, p. 109, the number stated was 198. In the 15th report, p. 43, are stated in the year 1839, for Frankfort, 80 receptions, (8 more than in the year previous where there were 72,) on p. 46 and 47, however, 86 are mentioned twice; likewise, p. 43, we find for Columbus, one who was shot in the attempt to escape, p. 46, we find the same counted up as having occurred in Frankfort. In the 13th report, p. 109, it is stated, that in the year 1832, there had been dismissed from Sing-Sing 65, (instead of 133,) 34 had been pardoned, (instead of 28,) and 28 had died, (instead of 153.) His mistakes of this kind are in quantities everywhere. When a person only reads over such a passage, he cannot discover the mistake, but when he wishes to make up for himself, from all these reports, general tables, as we have tried to do, or when he compares each individual

number of the Boston reports with the official original reports, so far as he is able to procure them, he finds everywhere these self-contradicting numbers and mistakes. But then we may ask, for what purpose are these reports when that which relates to facts, is for the most part false, and one consequently does not know, what to take as true and what not, — or of what value are tables which contain false numbers? Truly not much or nothing at all.

That no one need think that the mentioned mistakes are only misprints, or trifling, or rare exceptions, we will show, by a few examples, with what unaccountable carelessness of the enormous expenses, which the society devotes to the making of these reports, everything statistical has been treated.

Let us take, for instance, the table furnished in report 18, p. 102, occupying not quite half an octavo page, on Philadelphia, which has been so much attacked, and compare it with the original reports, and we find on this small space not less than fifteen false numbers, (and others, 159 and 133, after expiration of the time of punishment in the years 1837 and 1838, instead of 137 and 110, &c.) Or, let us take the table taken from the 19th Boston report, and accurately reprinted in this volume, p. 143.[1] When we add up the numbers of the different columns, we find the sum total of the 1st, 2d, 6th, and 7th columns not agreeing with the numbers.[2] Is now the summing up incorrect, or are some of the above placed numbers false? This is what we cannot know. Let us further consider the table in its other direction; let us take the number of prisoners that were left at the beginning of the year, (column 1,) add to it the number of those received in the course of the year, (column 5,) and subtract therefrom the number of all that were discharged in the same year or died, (columns 6–9,) — we must find the number of those that remained at the end of the year (column 2.) But the numbers of this column do not agree, on this table, with regard to eight penitentiaries; they are correct only with the four smallest, and the two Philadelphia ones. Where is now the mistake here? But this must be clear, that a table, in which one-half of the numbers is incorrect, has no value, and that the statements of the author of it *cannot be relied upon at all.*

We will lay before our readers only one table more, because a remark generally important may be at the same time connected with it. On page 48 of the 14th report, several times mentioned, is found a small table on the relative mortality in prisons during the years 1828–1838. The last six columns relate to the penitentiaries at Charlestown, Philadelphia, and Auburn. One column for each penitentiary is always headed 'Prisoners,' and the other 'Deaths.' We wished to convince ourselves, more accurately, on what basis Mr. Dwight makes his comparisons; we had therefore to take the official reports of these institutions, and from them to extract and put together, from each individual year, the re-

[1] The only alteration that we have allowed ourselves to make, is the addition of the *a* and *b* in the seventh column. Though the original has these two notes, yet through fault of the printer, or proof-reader, or somebody else, the notes have nowhere been designated in the tables. The numbers 23 and 3, by which we have placed them, are the only ones, to which they seem to be adapted.

[2] We supposed that the sum total would perhaps agree, if the omitted numbers were added for the penitentiary in Pittsburg; but this is not the case, for then not a single other column would agree. Mr. Dwight could, with some attention, have supplied these numbers, for though he was, perhaps, not yet in possession of the proper Pittsburgh official report, he need only to have referred to the last page of his own nineteenth report, in order to find there all the numbers by Mr. Barrett. This also is an additional proof of the negligence, with which these reports are prepared.

spective numbers. We then found that Mr. Dwight understands, by the title 'Prisoners,' in Charlestown, those remaining at the commencement of the year; in Philadelphia, the daily average number; and in Auburn, (without any nearer notation,) for the first six years those remaining at the end of the year, but for the last four years the daily average number, and for the seventh year he reprints once more the number of the preceding year. This is, however, the case in almost all the reports, and with regard to the majority of institutions; everywhere we find the title 'Number of prisoners;' by this he understands, in one case, those remaining; in another, these and the new comers taken together; and in another also, the daily average number. One never knows, for certain, what is to be understood by this title. If we want, however, to arrive at any result, which may have any the least value, we must begin from the beginning over again, and examine the official documents of the different penitentiaries one by one; (these it is difficult to procure, even in America, as they are soon wasted.) Of what use then are all the numbers and facts, collated at the expense of one hundred thousand florins, (about $ 50,000,) when they are so little to be *relied upon*, that one has to examine and calculate them over again, and, if one wishes to be accurate in his labors, one cannot with safety rely upon a single one! Of course there are not many people who have pleasure and leisure for the not small trouble of thoroughly studying the Boston reports; on the contrary, most persons have read them over only cursorily, and of the conclusions resting on so slight a foundation, accepted what pleased them. Thus, then, it has happened, that these reports have, here and there, essentially contributed towards spreading errors.

It now remains for us to prove, that those extracts and statements of Mr. Dwight, incomplete and not to be relied upon as they are, have been made often with as little frankness and candor; that frequently the most important and well-known points have been passed over, and on the fragmentary premises a different conclusion has been built than would have been possible with more completeness. This is principally the case when the author wishes to attack the Philadelphia penitentiary system. To this system he objects, (beside the smaller income from labor, which is obtained, because the whole domestic discipline is less arranged with a view to the greater profits from labor,) principally, the severe punishments, the great mortality, the many cases of insanity, the convictions and relapses; and seeks to defend his objections from the conclusions therefrom. From this it may be seen, however, either that we Europeans know much more accurately than Mr. Dwight the circumstances of the Philadelphia penitentiary, or that he purposely misunderstands and conceals many things.

In relation to *punishments*, he produces, in fact, nothing else than what he discusses at large in several reports, resting upon the authority of McElmee, which is more than suspicious, the punishment inflicted upon the prisoner Macumsey. The case was as follows: In 1834, several persons in Philadelphia made the complaint, that a refractory prisoner. Macumsey, had received the punishment with an instrument which, when he violently shrieked, pressed against his palate, so that he died soon after it. Although all impartial persons saw in the whole accusation only an attack of political opponents of the superintendent of the Philadelphia penitentiary, Mr. Wood, (since, in America, politics unfortunately interfere with many things where they do not belong,) yet the highest department of government appointed a committee to investigate the case. The investigation was made thoroughly and circumstantially; several dozens of witnesses were examined; but the final conclusion was, that the death had nothing to do with the punishment, and that this certainly abominable mode of punish-

ment was not entirely what it had been alleged to be, and further that it had been applied without order from the superintendent. This act of punishment, which occurred once, appears to us, though the complainants were dismissed, to have been highly improper and unworthy; but this case happened in the year 1834, and, since then, this mode of punishment has never been again inflicted; on the contrary, all those who have visited and studied Philadelphia, report, that the disciplinary punishments, inflicted there, are both mild and rare. (See, for instance, *Tellkampf*, p. 119.)

Mr. Dwight, however, does not hesitate to bring up once more at large, this one instance in the report of the year 1843. This alone, we think, may best prove that he was not able to find anything improper in the mode of disciplinary punishment of the Philadelphia penitentiary for the last ten years. It is only surprising, that he does not mention scarcely at all, or only passingly, the terrible punishments which in Sing Sing and other Auburn penitentiaries, belong to the daily practice, and that he never recurs to them again. In Philadelphia, the highest state authority found, upon close examination, nothing deserving censure in that one case. In Sing Sing and other places, directors and magistrates utter exclamations of horror; thus, for instance, we read in a report of a committee to the Senate of April 16th, 1839, on Sing Sing: 'that an insane prisoner had received in three weeks, one thousand lashes, that sick persons in the hospital had been whipped, and that others had been incapacitated by blows; that there was reason to believe that prisoners had been driven to commit suicide, through the cruelty of the officers, and that persons of mental disease had died in consequence of the hard punishments,' (p. 5, 6 and 32.) Mr. Dwight knows this very well, but he gently passes over it, (see fourteenth report, p. 41.) In consequence of this investigation, the superintendent of Sing Sing, Mr. Lynds, was discharged, and a milder discipline introduced; but after this, disorder and insubordination gained ground to such a degree, that they had to apply once more to Mr. Lynds, and replace him in the office. Now the lavish dealing out of whipping began anew, as one of the inspectors of this penitentiary, Mr. Edmonds, lamentingly informs us at the end of the year 1844, (see below his speech in the New York report.) Notwithstanding this cruelty, which for tens of years has daily taken place in many Auburn institutions, it does not occur to the advocates of the separate system, to tell us that with the Auburn system, poor insane and bed-ridden patients must be whipped, and whipped to draw blood, and others be driven even to suicide. They only assert and *prove* by *figures*, that in all Auburn institutions the punishments must be far more frequent and severe, than in the Philadelphia ones. (This proof we shall furnish at the end of this, or at the beginning of the next number, in an answer to Mr. Dwight, but omit it here for the present in order to avoid repetition.) But we may be allowed to wish, that Mr. Dwight would not always bring up again his one case which occurred eleven years ago, and join erroneous reflections with it.

The objection that the Philadelphia system necessarily causes a *greater mortality* of prisoners than the Auburn, we find repeated in all reports from the 10th to the 18th, though in most cases expressed but briefly, but the more decidedly and violently. A few times, however, as in the 12th and 17th reports, there may be found a distant attempt at a comparison based upon several institutions, but it is extremely imperfect, and many figures are incorrect. In most reports, however, we find repeated, without any further evidence, simply the following sentence, (often adorned with initials): in Auburn institutions the mortality is 2.00, in Philadelphia 5–6.00; the latter system, hence, kills three times as many men as the former. In the 17th report, where Mr. Dwight furnishes more than else-

where, some materials, he places the institutions of Concord, Wethersfield, Boston and Auburn against Philadelphia; but he takes good care not to mention the institutions at Baton Rouge, Columbus, Baltimore, Sing Sing and Nashville, because these being, besides, the largest and most important Auburn penitentiaries, have, every one of them, a decidedly larger mortality than those mentioned by him, (see vol. vi. p. 47); and on the other hand, he does not speak of Trenton and Pittsburg, because they have a smaller mortality than Philadelphia. He has done as Mr. Lucas and Mr. Faucher (see vol. v. p. 235 and 240,) in order to attack the Philadelphia system; they select, on the one hand, the best years, and some of the most favorable Auburn institutions, and they take, on the other hand, only the worst year of Philadelphia, which labors under the most unfavorable external circumstances, and then call out in unison (18th report, p. 48): 'We know no parallel to this among all the reformed prisons in the United States.'

We would fain know, what may not, in this manner, be asserted, at pleasure, and apparently be proved. However, it is well known that the mortality in the Auburn institutions is not 2.00, as Mr. Dwight states, but 3.10, and that in Philadelphia was not 6.00 but 3.40, (see vol. vi. p. 48.) *Once* Mr. Dwight mentions the color, (report 18, p. 47,) and says: 'This has been the standing apology, for years, of the inspectors and physician, for the dreadful mortality of the prisoners, that so large a proportion of them are colored. It is the strongest reason against the system, instead of being an apology for it. Their color indicates that they have been neglected and down-trodden. Why adopt a system of punishment for their crimes, which is so destructive of human life to persons of their color? Is this humane? Or are not colored people human? Is patience a virtue, in the endurance of such wrongs?'

With these *phrases* Mr. Dwight dismisses this question. He, *of course*, *conceals*, that also among the *free* population in Philadelphia, the colored people have a mortality as large again as the white, (see vol. iv. p. 5); he, *of course*, *conceals*, that also in the Auburn institutions the colored prisoners have a greater mortality than the white, and that, for instance, in Wethersfield, (the best Auburn penitentiary, which is more healthily situated than Philadelphia,) the yearly mortality of the colored persons amounted, in the years 1841 – 1844, to 10.00, and in Philadelphia, on the other hand, only to 6.00. Mr. Dwight *of course conceals*, that the mortality in the former penitentiary, with the social system, amounted to 6.00, whilst with isolation it has fallen to 3.9. Mr. Dwight, *of course*, *conceals* that in Philadelphia 9, but in Auburn 43, were pardoned, or sent off before the expiration of their time of punishment, and that, according to the statement of the physician of Auburn, especially the sick are pardoned, (see vol. vi. p. 49); — for from all this it would appear that Auburn, with the same elements of population, has a greater mortality. Nor is anything said anywhere of the geographical position of the different penitentiaries, which, as proved, (see vol. vi. p. 38,) has a very great influence upon mortality. In conclusion, yet one remark. If the philanthropists, who wish to have the separate system exchanged for the silent system, because the former, *in their opinion*, kills by far more prisoners than the latter, would only be a little consistent, they would, carried away by this one-sided over-estimate of the point of health, (not considering at all the erroneousness of the supposed greater mortality) certainly arrive at this, (1.) to give up the system of Geneva, applied by many excellent men with a smaller number of prisoners, for that of the Auburn institutions of North America, where there is, it is true, a much inferior discipline, but where also occur less deaths and less mental diseases than in Geneva, (see vol. ii. p. 91, 92); and then (2.) also to exchange the Auburn system for that of the penitentiary of the

State of Maine, in Thomaston, where the prisoners lie in subterranean cells, into which one comes through a trap door from above, but where the mortality amounts only to 1½ per cent., while that in the Auburn institutions amounts on on average to double the number, and even in the most favorable and best (as Auburn, Boston and Wethersfield,) is at least always higher than in Thomaston. But notwithstanding all this mortality, nobody would expect any rational people in Geneva to be instructed by Auburn, nor the Auburnists and Mr. Dwight to be instructed by Thomaston. But would that these latter would at least take the trouble, rather to study a little better the facts and all their influencing circumstances, than repeat for ten years, always the same positive assertions without evidence!

In regard to the *mental disorders*, Mr. Dwight takes great pains to point out particularly, in every manner, the influence of isolation, pretended to be so destructive to the mind. He reprints repeatedly, for instance, the tables which the inspectors of Philadelphia give in their official yearly reports on cases of insanity that have there occurred, and in the fifteenth report he is so much engaged by it, that he allows but one fourth part of the space of the table to all the other materials on Philadelphia.

Of the cases of insanity observed in the Auburn penitentiaries he speaks almost not at all, or skips lightly over them. To give an example of but one institution, how easy he takes it, or what an excellent interpreter he is, he says of Sing Sing, where in the report for 1838, the mental diseases are no further discussed, that *no* case had occurred; the next year he says, that the number of the insane was unknown, (p. 40); but we hear only accidentally, (p. 41,) that insane persons have been cruelly whipped; but he wholly omits the fact that according to the printed official yearly reports, 24 insane were there in the year 1843, of whom 7 were delivered over to the insane hospital, and that the inspectors asked for relief. In a similar manner (but of course the reverse) he proceeds with Philadelphia; he reprints repeatedly the tables of Dr. Darrach, which partly proceed from an erroneous point of view; but he communicates nothing of the *whole* fifteenth report of the inspectors and officers on Philadelphia, which was known to him, as is seen from pp. 62 and 63. It will be well recollected, that this very fifteenth report, which we have given in extracts, vol. vi. p. 76 – 95, is one of the most important, if not the most important and instructive of all, and that what Dr. Hartshorne there states on insanity, is (in our opinion) not only the best but also certainly the most minute statement, which has ever been contained in an American prison report on insanity in prisons. This last point at least, large enough to be measured with a ruler, Mr. Dwight could not overlook, but he does not mention with a single word, that a Mr. Hartshorne has reported anything on the insanity in Philadelphia. From all this and many similar things it is apparent that, on the one hand, Mr. Dwight knew very well all the mentioned points, concealed by him, and that he therefore did not care so much for the *truth*, but only to attack in the apparently best manner. We leave it to the judgment of the reader whether such a mode of discussion or warfare can be called scientific and legitimate. The chapter of insanity in Philadelphia, however, has been in this journal, already spoken of so much at large (see vol. vi. pp. 54 – 72, 88 – 94, 103 – 112, and 115 – 124,) that we only refer to it. We only had to show the manner in which Mr. Dwight for the last ten years has treated this difficult question.

In regard to the *increase* of *convictions* in the penitentiary at Philadelphia, Mr. Dwight informs us (13th report, p. 46,) that the number of them showed a considerable increase compared with previous years, and that the conclusion might

be drawn from these facts, that the Pennsylvania prison system did not prevent crimes, and had not diminished the number of convictions; then (14th report, p. 48,) that the number of convictions in Philadelphia since the institution was completed, shows an increase which is uncommon with Auburn prisons, further (18th report, p. 55,) that the Pennsylvania system has failed to answer the expectations and promises of its early friends in deterring from crime and preventing recommitments, etc. Till the year 1839, are given incomplete numbers, and from thence no numbers at all, as proof of these assertions. If Mr. Dwight had ever put together the number of commitments to the old and to the new state prison in Philadelphia and to that in Pittsburg, which he might certainly have done as well as we (see vol. v. p. 263, and vol. vi. p. 32,) he must have convinced himself at once, that within fourteen years, the number of commitments in Philadelphia, has diminished 33 per cent., while the population had an increase of 38 per cent. If we take for comparison only that which Mr. Dwight says, (19th report p. 44,) on the decrease of prisoners in the state prisons, the result is, that there was in no one of all the given states, a diminution of commitments which equals that in Pennsylvania, and that in the three states which have the last Auburn penitentiaries, Connecticut, Massachusetts and New York, there was a diminution of 10 and 2 per cent., within the two first, and in the last a small increase of 2 per cent., while Pennsylvania shows a decrease of 33 (resp. 50) per cent. All these are facts with which Mr. Dwight is familiar; but he never places them together in such a way, that the actual true result presents itself clearly to view, and, therefore, continues undisturbed to declaim against the many commitments in Pennsylvania.

Mr. Dwight also makes the Philadelphia penitentiary, great reproaches for the *relapses* and their uncommonly large number. These reproaches begin already in the eleventh report (1836.) In almost all the following reports the same reproach is repeated. In the 18th report, p. 46, he says; 'Another important result from the tables is in regard to the *number* of *reconvictions*, 42 out of 142 are on record, third, fifth, and sixth convictions, are more than one fourth part of the whole. This is for the last year; for the whole term of time, the proportion is nearly the same, 499, out of 1622, have been old convicts for second, third, fourth, fifth, sixth, seventh, and ninth convictions. It is difficult to find, in the records of any prison, under even the old and corrupt system of prison discipline, a stronger proof than this of the corrupting and demoralizing tendencies of the system.' Mr. Dwight, in order to represent the matter more glaringly, counts here also the 19 per cent. relapsed, who had heretofore been only in Auburn prisons; as his 14th and 13th reports prove, he very well knew of the difference of these from the relapsed graduates of the Philadelphia penitentiary. The reader may compare what we have communicated, (in vol. vi. pp. 30–32,) with an accurate tabular view of all numbers, and he will see in how far these violent accusations are founded.

In conclusion, only two remarks more. Mr. Dwight also takes the trouble (18th report, p. 95, and further) to collect the voices of the principal authorities against the Pennsylvania system, and reprints them. Here we find Roscoe, Lafayette, Combe, and Dickens. The remarks of both the first men, however, were made before the penitentiary of Philadelphia went into operation. Combe is, no doubt, an able, instructed man and a conscientious observer; but we think we have shown, vol. iii. pp. 62–75, in what points Mr. Combe erred, who is, however, anything but an absolute opponent to isolation. Of the novel writer Dickens, (Boz,) we have spoken already several times; we call here to recollection only, that his imagination caused him to see many things in Philadelphia, which have

been decidedly refuted since, (see vol. iv. p. 194,) and even to hold conversations in Pittsburg, of which the other persons present know not a single word, (see vol. v. p. 6, 7.) For a novel, this abundance of imagination is very beautiful, but we desire to be spared, to have such pictures of imagination served up repeatedly as something serious. The advocates of isolation do not indeed think, to dispose of the question between the two systems on the mere authority of Eugene Sue, who cannot well be denied to have a knowledge of man in general, and a knowledge of criminals and prisons in particular, and a sincere, earnest wish to work, in his way, for true improvement and happiness of the people.

Further it deserves notice that, as appears from the reports of 1842 and 1843, the states of Massachusetts (Boston) itself and New York have ceased to buy, as heretofore, from the Boston Prison Discipline Society, several hundred reports, for the support of the society. It was discontinued in Boston on the motion of a man who is highly deserving of honor for his interest in the poor,[1] since it was found, that the reports no longer advanced general information, but were serving only a petty party interest. This disapprobation has now also found ts way in another circle. The new Philadelphia prison journal contains, (p. 302,) the following short article: "Twentieth report of the Boston Prison Discipline Society. The reports published under the name of this society should properly be styled, 'Remarks of Mr. Dwight on Prisons, etc., published at the expense of his protectors.' With satisfaction we learn that the respectable gentlemen, who compose this society, have at last declined to sanction the false representations of Mr. Dwight, and have directed an examination of the erroneous representations by a committee whose report is to be published." By a letter from Philadelphia, we learn that in September, a committee of the Boston society was expected in Philadelphia, accurately to investigate and examine the penitentiary there. If the members of this committee be men who are thoroughly acquainted with the subject, to whatever system of prison discipline they may otherwise be addicted, certainly only explanation and further information can be the result of this mission.

Recent American Decisions.

Supreme Judicial Court, Massachusetts, March Term, 1846, at Boston.

Nathaniel Melcher *v.* City of Boston.

A clerk in a post-office, who is appointed by the deputy postmaster, and his appointment approved by the postmaster-general, is taxable for the income derived from his employment as such clerk.

Assumpsit to recover back the amount of taxes on the income of the plaintiff, assessed upon him by the assessors of the city of Boston, and paid by him to the city of Boston. The judge in the

[1] This motion was brought forward by Dr. Howe, when a member of the legislature of Massachusetts.—*Editor.*

court of common pleas, who tried the case, reported the facts as follows. "It was agreed, that during the six years next before the commencement of the action, the plaintiff was a citizen of Boston, and was, in each year, taxed for his income; that the amount of such tax was, in each year, paid under protest; that during all the time aforesaid, he was a clerk in the post-office in Boston; that he had no property liable to taxation; that he had no income besides that derived from his employment as such clerk; and that his salary, as such clerk, was the only subject of taxation in said years. It was further agreed that, in practice, the clerks in said post-office, were appointed by the postmaster at Boston, subject to the approval of the postmaster-general, who, by usage, exercises the power to remove any such clerk, at his pleasure; that the plaintiff was thus appointed by the postmaster at Boston, and that his appointment was approved by the postmaster-general; that an annual appropriation was made by congress, during the years aforesaid, for the pay of the clerks in the several post-offices throughout the country; that, of the amount thus appropriated, the postmaster-general set apart a certain sum to defray the expenses of clerk hire in the Boston post-office; that this sum was apportioned, by the postmaster at Boston, among the various clerks in his office; and that the portion thus assigned to the plaintiff, constituted the income for which he was taxed as aforesaid. The postmaster at Boston testified, that after the apportionment of the salaries was made by him among the clerks in his office, the statement of such apportionment was forwarded by him to the postmaster-general, for his approval, before the salaries were paid over. Upon these facts, the court instructed the jury, that the plaintiff was entitled to a verdict, which was returned for him accordingly. To this instruction the defendants alleged exceptions."

J. Pickering, city solicitor, for the defendant. By the Rev. Stat. c. 7, § 4, income from any profession, trade, or employment is included in the personal estate which is made subject to taxation, and there is no exemption in § 5 of income derived from an office held under the government of the United States. But if there were such an exemption, it would not assist the plaintiff, for he is not an officer of the United States. A postmaster is such officer, but not his clerks. The United States *stat.* 1825, c. 275, § 11, requires every postmaster to have "one or more persons," to attend at his office, and § 42 forbids any "clerk employed in any post-office, "to be a contractor, &c. for carrying

the mail. But there is nothing in this statute, which prescribes the mode or source of the appointment of clerks, except in the postmaster-general's office. A certain sum, as the case finds, is allowed by the postmaster-general for the clerk hire; but the deputy postmaster (in Boston, if not elsewhere) fixes the clerks' salaries.

J. P. Putman, for the plaintiff. The state cannot tax the income derived from an office held under the laws of the United States. *Dobbins* v. *Commissioners of Erie County*, (16 Pet. 435,) reversing the judgment of the supreme court in Pennsylvania, in 7 Watts, 513; *McCulloch* v. *State of Maryland*, (4 Wheat. 316); *Weston* v. *City Council of Charleston*, (2 Pet. 449.)

The clerks in the post-offices, are officers of the United States. "An office," says Marshall, C. J., "is a public charge or employment, and he, who performs the duty of the office, is an officer. If employed on the part of the United States, he is an officer of the United States," 2 Brook, 102. Clerks in post-offices are the "inferior officers," whose appointment may, by the constitution of the United States, art. 2, § 3, be vested by congress "in the heads of department," see *Ex parte Hennen*, (13 Pet. 260.) The facts in the case at bar show how the plaintiff was appointed to his office. By United States *stat.* 1836, c. 270 § 2, 22, the postmaster-general is required to submit to congress yearly, specific estimates of the sums expected to be required, for the service of the department, including, among other things, "clerks for offices," and to make report yearly, of all these expenses. By § 9, he is to control "the expenses of post-offices, and all other expenses, incident to the service of the department." By the United States *stat.* of March 3d, 1843, c. 97, $210,000, were appropriated for clerks for the offices of postmasters. If then their salaries are taxable, they will be diminished by taxation, contrary to the law, as laid down in 16 Peters, 435. By the United States *stat.* of 1825, § 2, the clerks take an oath to the United States, a certificate of which is filed in the general post-office. By the *stat.* of 1836, § 22, they are exempted from doing military duty; congress thus treats them as government officers, by passing laws relative to them in their offices.

Dewey, J., delivered the opinion of the the court as follows. The plaintiff relies upon the case of *Dobbins* v. *Commissioners of Erie County*, (16 Pet. 435,) as an authoritative decision governing the present case. Giving to that decision all the force and effect of a judgment of the highest tribunal, upon the question there

raised, yet there arise, in the case at bar, two important questions for our consideration. 1st. Was the plaintiff an officer of the United States, in any such sense as would entitle him to the immunities from taxation, which were adjudged to attach to Dobbins, as a captain of the United States revenue cutter? 2d. May not a tax upon "income" be assessed upon all citizens of Massachusetts, residing therein, as well where such income is derived from the national government, by way of compensation for services rendered to it, as from any other source?

As to the first point, we have looked in vain for any statute provision, creating any such corps of United States officers, as clerks in the post-office. The practice has existed, it seems, of making such appointment of clerks, on the recommendation of the local deputy postmaster to the postmaster-general, and approval by him. The authority to employ these agents, and others of all the various grades, connected with the carrying and operating of the mails, and conducting the concerns of the post-office generally, is undoubtedly properly exercised by the post-office department; but the statute of 1825, c. 275, which is understood to be particularly relied upon, as the act regulating the post-office department, does not, in terms, create any such office, or give any such character to these agents, as entitles them to be denominated public officers of the national government. It authorizes the employment of persons to assist in the various duties of taking care and custody, and the carrying of the mail, and prescribes the form of an oath to be taken by all such; and money has, from time to time, been appropriated to pay the contingent expenses of the post-office, which money has been in part applied to the payment of the clerks in the various post-offices. We do not perceive anything in the statute regulating the post-office department, or in the duties discharged by the plaintiff as a clerk under the deputy postmaster, which should require us to recognize the service of the plaintiff, as that of one holding a public office; certainly not an office of that character which entitles him to an exemption from the common burdens of taxation, based upon actual income.

The case in 16 Peters, 435, already referred to, was essentially different. Dobbins was a captain of the United States revenue cutter. He was an officer of the United States, appointed by the president, under the provisions of a statute creating the office. It was a clear case of one holding an office under the United States government. The statute of Pennsylvania, under which the question arose, authorized the assessment of a tax "upon all offices

and posts of profit." The tax was upon the office. The taxing power assumed to deal with him as one holding an office. In the case at bar, no such recognition of the party as a public officer exists, and no tax was assessed upon the office.

It is not every employment in the United States service, that constitutes the person thus employed an officer. Thus it has been held, that a contractor for carrying the mail is not an officer of the United States government. *Whitehouse* v. *Langdon*, (10 N. Hamp. 331.)

As it seems to us, the plaintiff has failed to bring himself within the case of *Dobbins* v. *Commissioners of Erie County;* not being an officer of the United States in any such sense as will exempt him from taxation in common and in like manner, with all other citizens and residents of Massachusetts. He is therefore liable to taxation "for income" and that as well for income derived from compensation for services rendered the national government, as from any other source.

This view of the case renders it unnecessary to express any opinion upon the second question, viz., whether a tax "upon income" may not well be assessed upon one holding a public office under the general government, and where "the income," which is the subject of taxation, is the compensation received as allowance for services rendered in such public office. This question we do not propose to examine particularly, much less to decide; but we deem it proper to say, that such form of taxation may present a different question, and authorize a different decision from that in *Dobbins's case*, (16 Pet. 435.) The tax upon income is not a tax upon the office directly. It would seem to be only carrying out the great principle of assessing taxes proportionally and equally, according to the ability of the persons taxed. Its form is unobjectionable, pointed at no particular class, whether office-holders or otherwise, but embracing, as proper subjects of taxation, all who place themselves under the protection of our local government, and participate in common with others, in the free enjoyment of our schools, our institutions, the protection of our laws, and the benefits resulting from their due administration, our public ways, and all those beneficial objects for which these taxes are assessed. We are not disposed to assume in advance, that the supreme court of the United States will decide that a tax "upon income" will be illegal, if assessed upon a resident of Massachusetts, deriving his income from the compensation allowed him for services as an officer of the United States. But, without expressing any further opinion upon that point, we are all clearly of opinion, that the plaintiff was, for the other reason already stated, subject to taxation for "his income," and that this tax was therefore properly demandable of him.

Supreme Judicial Court, Maine, April Term, 1846, at Portland.

RUNDLETT *v.* SMALL.

Promissory Note; — Payment; — Account; — Witness; — Evidence; — Res Gestæ.

THIS was an action on a promissory note, and the defence was payment. A former suit had been commenced on an account between the same parties; and the witness introduced in that suit by the plaintiff to prove certain orders charged in account, testified, on cross-examination, that certain sums had been paid by him to the plaintiff, with directions to apply it to the account. It appeared, however, that they had been indorsed on the note now in suit, instead of the account, and the note thus paid had been given up to the defendant. On this testimony, the plaintiff abandoned his first suit for so much of the account as was proved to have been paid in the manner above stated, and brought this action on the note, and a general count, to recover the money which had been indorsed on the note. To support this action, he proposed to prove what his former witness had testified in the first suit, although that witness was present in court, and competent to be examined in the case. This was objected to, but admitted, and exceptions taken. The court decided that the testimony was admissible; for it was not introduced to prove the facts to which that witness had testified, but only that he did so testify, and that the result was produced by it. It was part of the *res gestæ*, to which any witness might be called.

GORE *v.* MOORE.

Promissory Note; — Indorser; — Demand and Notice; — Insolvency of Maker.

THIS was an action against the indorser of a promissory note. The defence was, that no legal demand was made on the maker, and no notice given to the indorser. To this it was replied, that the maker was dead before the note fell due, and his estate was insolvent. The court decided, that this did not absolve the holder from giving notice to the indorser. The opinion declared that the rule of law requiring notice should not be relaxed. Commercial policy demanded its enforcement.

Kennard *v.* Burton.

Collision on the Highway; — Negligence; — Damages; — Law of the Road.

The rule was laid down, that if the party suffering injury contributes to the collision by want of ordinary care, he will not be entitled to recover. If both parties are in the wrong, neither shall recover. Damages may be recovered for collateral injuries; thus the plaintiff may recover for the loss of the service of his daughter, who was disabled by the collision, if she was of sufficient age to render service to her father. Both parties are bound to use ordinary care, and to keep on the right of the centre of the travelled part of the road, if practicable, and there is room to pass each other when they meet; if not, the one who cannot turn from the centre of the road, must stop in a convenient place to permit the other to pass.

White *v.* Henry et al.

Infancy; — Marriage; — Seaman's Wages; — Parent and Child.

The plaintiff in this case was the father of a minor, who married without the consent and against the will of his father. The action was brought to recover for services of the son, rendered to the defendants as a seaman. The defendants pleaded payment to the son, and contended that his marriage was an emancipation. The father proved that the marriage was against his express consent, and that he was at all times ready to furnish his son a suitable support. It was *held*, that the action should be sustained; the marriage of a minor against his father's will does not emancipate him, nor entitle him to maintain an action in his own name for wages. Defendants defaulted.

Covell *v.* Gerts.

Sale of Mortgaged Personal Property; — Notice to Mortgagor; — Evidence of Value.

The defendant mortgaged to plaintiff certain articles of personal property, to secure the payment of a debt payable on a given day.

After the credit expired, the plaintiff sold the mortgaged property at auction, without giving notice to the defendant. It did not bring enough to pay the debt, and this action was brought for the balance. The court held, that if the mortgagee would hold the mortgagor liable for any balance over the proceeds of the sale of personal property mortgaged to him, he must proceed in the same manner as if it were a mere pledge. Reasonable notice must be given of the time and place of sale. The mortgagee in this case not having so proceeded, the mortgagor is not bound by the sale, but may give evidence of the value of the property. He is not precluded by the auction prices.

ROBERTS *v.* PIKE.

Promissory Note; — Commencement of Action; — Indorsement.

ASSUMPSIT on a promissory note. It was contended in defence, that the note was not indorsed to the plaintiff until after the commencement of the action. It was not indorsed until after the date of the writ; and the plaintiff offered parol testimony to show that the writ was dated some time before it was finished and ready for service, and that the note was transferred before the writ was completed. The testimony was objected to as incompetent to control or explain the record. But the court, in an able opinion delivered by Judge Shepley, in which he reviewed the authorities applicable to the point, overruled the objection, and admitted the testimony. Cases were cited from 4 Day's Reports, 13 Maine, 191, and an opinion drawn by Wilde, J., in the supreme court of Massachusetts.

WOODMAN *v.* VALENTINE ET AL.

Verdict; — Issue; — New Trial.

ACTION of debt on a debtor's bond. The condition of the bond was, that the debtor should disclose, pay the debt, or surrender himself to the jailor within six months. The defence was, that the debtor had surrendered himself within six months; and it was submitted to the jury to find the fact of the surrender. They returned a verdict that the debtor was surrendered by the

surety; and being informed that they had not responded to the issue, and the parties objecting to their retiring to correct it, it was affirmed as returned. The court set aside the verdict as not properly affirmed, and granted a new trial.

Brown *v.* Osgood.

Fraudulent Sale; — Equity; — Evidence; — Surprise; — Deposition.

This was an action by a creditor, to set aside a sale of land from a father to the defendant, his son, as fraudulent against creditors. The defendant took the deposition of the father to prove the honesty of the transaction; he testified that the sale was *bona fide;* was cross-examined, and the deposition was placed on the files of the court. At the trial, the defendant declined using the deposition, and the plaintiff, to prove certain facts brought out on cross-examination, was compelled to introduce it. It was contended by the defendant, that in adopting the deposition, he must take it entire, and was precluded from denying the facts it contained, unless taken by surprise; and that he was not taken by surprise in this case, as he knew what the testimony was before he introduced it. But the court decided that the deposition must be taken as if the cross-examination were the examination in chief; and the examination in chief as if it were the cross-examination; the position of the parties therein being reversed. If the plaintiff has, in his examination of a witness, obtained evidence of a series of facts necessary to support his case, and the other party has proved by the same witness a fact necessary for his defence, the plaintiff has a right to offer evidence to disprove or contradict that fact or statement. As to the matter of surprise, it was doubtful from the authorities, whether it was applicable, except it were proposed by the party calling the witness, to show that he had given a different account of the transaction on a former occasion. This he could not be permitted to do, unless he had been taken by surprise in relation to the testimony of the witness; and the plaintiff, in this case, may be permitted to controvert the fact relied on by the defendant, on the ground that the witness was mistaken. He had testified that the sale was *bona fide;* he might be mistaken as to what constitutes a *bona fide* sale; and it was competent to the plaintiff to show, that such was the fact. The authorities on these points were examined at length, and commented upon by the chief justice, who delivered the opinion of the court. The verdict which pronounced the sale void was sustained.

WINSLOW *v.* KIMBALL.

Probate of Will; — Evidence of Legatee; — Legacy to Witness Void.

APPEAL from a decree of the judge of probate approving a will. By the will, a legacy was given to the husband of one of the witnesses, which he relinquished before the instrument was proved in the probate court. It was objected that the wife, under such circumstances, was not a competent witness; and therefore the will was not legally executed. The objection was overruled, and the decree of the probate court affirmed, upon the ground that the statute has provided, that when a will is executed in the presence of three witnesses, one of whom is a legatee, the legacy shall be void and the witness be competent. Husband and wife are, in contemplation of law, but one person; a legacy to the husband of the witness was a legacy to her benefit, and therefore by the statute void. Two cases from the New York reports were cited, which fully sustained the present decision.

Supreme Court of the State of Arkansas. October Term, 1845.

HEMPSTEAD & CONWAY *v.* WATKINS, ADMINISTRATOR OF BYRD.[1]

It is a general rule that, if a creditor does any act injurious to the surety, or omits to do any act when required by the surety, which his duty enjoins him to

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[1] This case has been sent to us in the sheets of a forthcoming volume of the Arkansas Reports. It is accompanied by a statement that the decision is regarded in Arkansas as having a very unfortunate tendency to unsettle judgments at law, and add to the delay and expense of litigation. The report makes more than fifty pages. We can only give the abstract. We have been earnestly requested to publish "a critical notice of the decision;" but this is a course that we have seldom adopted, and our space will not admit of it in the present instance. Mr. Walker, the editor of the Western Law Journal, appears to have examined the case, and says, in the last number of his journal: "Upon the decision itself, the only remark I have to make is, that it contradicts all my notions of equity jurisdiction, and, as I believe, the general current of authorities." Accompanying the report sent to us, was the following statement by the state reporter:

"*Little Rock, Arkansas, March 14th*, 1846.

"At the request of George C. Watkins, Esq., in reference to the case of *Hempstead & Conway* v. *Robert A. Watkins*, administrator of *Ann L. B. Byrd*, deceased,

do, and the omission proves injurious to the surety, in all such cases the latter will be discharged, and may set up such conduct as a defence to any suit brought against him, if not in law, at least in equity.

The jurisdiction of this class of cases originally and intrinsically belonged to equity.

Since the case of *Rees* v. *Berrington*, (2 Ves. 540,) the giving of time by the creditor to the principal, upon a new contract, without the consent of the surety, has been considered and held as a settled subject of defence in equity.

This principle having been firmly engrafted in the system of equity jurisprudence, courts of law, acting upon the liberal principles of equity, have adopted the same rule as the subject of legal remedy, except in cases where the surety was estopped by his bond from averring his suretyship at law.

But the jurisdiction, now assumed in courts of law upon this subject, in no manner affects that originally and intrinsically belonging to equity.

Several courts of the United States, acting upon the same liberal principles of equity, have extended the defence of the surety further.

It was held in *Pain* v. *Packard*, (13 John. R. 174,) confirmed in *King* v. *Baldwin*, (17 John. R. 384,) approved by the supreme court of Tennessee, &c., and is approved by this court, that, if an obligee or holder of a note, who is required by a surety to proceed against the principal without delay, and collect the money of him, who is then solvent, neglects to do so, and the principal afterwards becomes insolvent, the surety will be discharged both in law and equity.

Our statute (Rev. Stat., ch. 137, sec. 1, 2, p. 722,) providing that, unless the holder bring suit within thirty days after notice, &c., the surety shall be exonerated from liability, declares a legal right, but it is based upon equitable principles.

The act is almost a reaffirmation of the rights which the supreme court, and court of errors in New York, and the supreme court of Tennessee had declared in the cases above cited, that a court of equity would observe and enforce.

It is but declaratory, and an extension of an existing and originally equitable

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decided by the supreme court of Arkansas, at special October term, 1845, I state that, by the law of this state regulating bills of discovery on the law side of the circuit court, and petition for the production of papers, &c., the allegations and proof of the original notice to sue in this case having been mislaid, constitute no equitable ground of relief to the complainants; further, that, by the constitution and laws of this state, a special judge could not be appointed, until the cause be presented requiring such appointment, and then it becomes the duty of the judge to certify such cause to the governor for the appointment of a special judge; and further, that the original suit at law, reported in 3 Arks. 266, was in precise accordance with the forms of declaration by an administrator, as laid down in Chitty, Lilly's Entries, Harris's Entries, and Saunders, and contained all the usual averments to show that the administrator sued in his representative capacity. I make these statements because, assuming the decision in 3 Arks. 266 to be the law of this particular case, and that, consequently, no suit, or no effectual suit, was brought within the thirty days after notice served, I desire, as far as I am concerned, that the decision of the court, in this case, shall rest upon the simple question, whether the complainants waived their right to relief by omitting to set up their defence in the second suit at law. I regarded and argued that as the only question involved in this case.

"ALBERT PIKE."

remedy, and which has been adopted and converted by courts of law into a subject of legal cognizance.

It extends the original remedy, or so qualifies it that the surety is not bound to show the injury resulting from the subsequent insolvency of the principal, to entitle him to a discharge.

Where the sureties to a bond (it appearing upon the face of the obligation that they are such) have given the holder notice, under the above statute, to sue the principal debtor, and he fails to bring a valid suit within thirty days, the sureties may plead their exoneration at law, in bar of an action on the bond. *State Bank* v. *Watkins*, (ante 123, cited.)

The defence in such case is available either in law or equity.

The 1st sec. of ch. 23, and the 3d sec. of chap. 43, of the Revised Statutes of Arkansas, providing that the circuit court shall exercise chancery jurisdiction, in all cases where adequate relief cannot be had at law, &c., are subject to the same construction, given by the supreme court of the U. S. to the 16th sec., chap. 20 of the judiciary act of congress of the 24th of Sept., 1789. These acts introduce no new rule, but are only declaratory of the jurisdiction of courts of chancery, as it stood before their enactment, and our circuit courts have jurisdiction over the same subjects as are common to a court of chancery, to be exercised according to the known rules of chancery as understood at the time of the passage of the acts.

Sec. 6, art. 6, constitution of Ark., provides that the circuit courts shall have jurisdiction in matters of equity until the general assembly shall deem it expedient to establish courts of chancery; by which is meant such jurisdiction as a court of chancery could properly exercise at the time of the adoption of the constitution.

The legislature possess no power to limit and abridge the circuit courts, as courts of chancery, in the exercise of a general jurisdiction thus conferred by the constitution: acts attempting it would be nugatory.

Where a defence is purely legal, and exclusively cognizable in a court of law, the party is bound to defend at law, and cannot have relief in chancery, unless he was deprived of his defence by surprise, accident or mistake, or fraud of the opposite party, unmixed with negligence on his part, or unless he was ignorant of important facts material to his defence upon the trial at law, and which he could not have discovered and availed himself of by due diligence at the time of the trial.

Where the jurisdiction of courts of chancery and courts of common law is concurrent, in consequence of courts of law having enlarged their jurisdiction by their own acts, or of its having been enlarged by act of the legislature without prohibitory words, the party may make his election as to the tribunal to which he will make his defence, and once having made that election, he is bound by the decision; and his right to submit the matter to a court of chancery is in no degree impaired by the power of courts of law, at this time, to take cognizance of the subject.

If a party resists a recovery against him, in a court of law, upon a portion of his defence, where he had full knowledge of the whole of the defence, and where, by due inquiry and ordinary efforts, he could have obtained the proof, he is, like other litigants in similar cases, bound by the election, and is considered as having waived or abandoned the grounds of defence so omitted to be made.

In a case of concurrent jurisdiction, if a party defends at law, chancery will not take cognizance of the cause, and rehear it upon the same state of facts upon

which it was tried at law, without the addition of any equitable circumstances to give jurisdiction, but will respect the judgment of a court of competent jurisdiction, already pronounced upon the facts.

Where the sureties to a bond give the holder notice to sue the principal debtor, under the above statute, and he fails to bring a valid suit within thirty days, though it appear upon the face of the bond that the sureties are such, they are not bound to plead their exoneration at law, to a suit against them upon the obligation, but may elect to suffer judgment to go against them without defence, and apply to a court of chancery for relief.

Where in such case the sureties make no defence at law, but waive their objections to the constitutional incompetency of the circuit judge to sit in the case, they are not thereby precluded from resorting to a court of equity for relief.

Where, in pursuance of such notice, the holder brings suit upon the bond, a demurrer to the declaration is interposed, sustained, and the judgment of the court affirmed by the supreme court, on error, it is conclusive upon the parties, and the holder of the bond stands in the same attitude as though he had instituted no suit at all.

The judgment in such case can never be collaterally reviewed by another tribunal.

Every court must respect the judgments of other courts of competent jurisdiction, and, if a judgment is pronounced in chancery, a court of law will never attempt to review it, or pronounce it erroneous.

So, if a court of law pronounces an opinion in a case, a court of chancery will never take cognizance of it upon the same state of facts upon which it was tried at law.

The correctness of the decision of this court, in the case of *Watkins's administrator* v. *M'Donald et al.*, (3 Ark. Rep. 266,) questioned; but the question there decided held not to be an open one.

[This was an appeal from the chancery side of the circuit court of Pulaski county; and was argued by *Pike & Baldwin*, and *S. H. Hemstead*, for the appellants; and by *Watkins & Curran*, contra. The opinion of the court was delivered by *Oldham, J.*]

Supreme Judicial Court, Massachusetts, Middlesex County, 1846.

WALTHAM BANK *v.* TOWN OF WALTHAM.

Shares in a corporation, pledged to a bank as collateral security, are not taxable to the bank.

THIS was an action to recover the sum of $64,80 and interest, being the amount of a tax assessed upon one hundred and twenty shares of the stock of the Fitchburg Railroad Company, held by the Waltham Bank on the first day of May, 1844, upon the following named circumstances and conditions, to wit: on the 16th day

of April, 1844, Sewel F. Belknap pledged the above-named shares to the bank, as collateral security and pledge for the payment of a promissory note, dated April 15th, 1844, for the sum of $10,000, which sum said bank lent to Belknap, who delivered to the bank a certificate, or written instrument, of which the following is a copy: "No. 439. For 120 Shares of 100 Dollars. The Fitchburg Railroad Company. This is to certify that the President, Directors and Company of the Waltham Bank, as collateral security for S. F. Belknap's note, is entitled to one hundred and twenty shares in the capital stock of the Fitchburg Railroad Company, subject to the provisions of the charter and by-laws of the Company, and to such assessments as may be legally made thereon. Transferable by an assignment thereof on the books of the Company, according to the rules established for such purpose. Witness the seal of the Company, and the signatures of the President and Treasurer, at Boston, this 16th day of April, A. D. 1844. (L. S.) Thomas Wiley, Treasurer. Jacob Foster, President pro tem." Which certificate entitled the said bank to all the privileges of the owners of stock in said company. The said bank, prior to, on, and ever since the first day of May, 1844, held, and had possession of said stock for the purpose of collateral security, as aforesaid, and for no other purpose. After the first day of May, 1844, the assessors of Waltham duly assessed a tax of $64,80 upon said shares to said bank, which tax was regularly committed to the collector of said Waltham; and on the 25th of March, 1845, the said bank, upon demand of said collector, and under protest, paid said tax to said collector. The case came up upon an agreed statement of facts, as above; upon which judgment was to be rendered by the court as upon a special verdict.

E. Rockwood Hoar, for the plaintiffs.
Mellen, for the defendants.

Wilde, J., delivered the opinion of the court, to the effect that the bank was not liable to taxation for the railroad shares, it appearing, upon the face of the transfer, that they were pledged for the debt of Belknap, and that, upon the facts agreed, the plaintiffs were entitled to recover the amount paid with interest from the time of payment.

Recent English Decisions.

Spring Assizes, Northern Circuit, April, 1846, *at Liverpool.*

REGINA *v.* BARRY AND OTHERS.

To constitute a nuisance, it must appear that there is something more than what is merely disagreeable. But that will amount to a nuisance which renders the habitations of persons in the neighborhood substantially less comfortable than they were before, although it should not be dangerous to health, or hurtful to human life.

THIS was an indictment for a nuisance. The defendants are carrying on business as iron ship builders, and have established a yard for that purpose on the banks of the Mersey, at the southern extremity of the town of Liverpool. They had formerly occupied a site further north, and more towards the centre of the town; but this they had been obliged to give up, it being required for the new docks about to be made by the Birkenhead commissioners. Immediately beyond this point was situated a retired dell called the Dingle, in and around which, for many years, the merchant-princes of Liverpool have built a number of country seats, and which, until a few years back, was a very retired and picturesque spot; the Dingle itself being the subject of a copy of verses, perhaps the neatest and most graceful composed by Roscoe, the author of the "Life of Lorenzo de Medici." Some time ago, however, this privacy was in some degree invaded by the establishment of the Herculaneum Pottery Works on the shore. These, however, were at some distance; and, though the smoke occasionally dimmed the prospect of the Welch hills, and disfigured the surface of the Mersey, the annoyance was no greater than was to be anticipated in the immediate neighborhood of so large and active a commercial community, so rapidly increasing. These pottery works, however, were discontinued about seven years ago. There were also established, and there are yet in existence, certain iron works, called the Mersey Forge, the principal business of which is the manufacture of the heavier parts of steam locomotives, principally the axles. For this purpose, a hammer, weighing some six or seven tons, and wrought by steam power, is used, and this

is wrought frequently all night through, the sound being distinctly audible all through the region of the Dingle. The sound was a dull, heavy one, caused by the beating of heated iron upon an anvil, and was not, as the witnesses alleged, productive of any serious annoyance. In May, 1845, however, the establishment of the defendants was got into working order, and, besides being much nearer than either the forge or the potteries, was, from its nature, productive of great annoyance to the promoters of this prosecution. According to the evidence, from six hundred to seven hundred men were usually employed, and the greater majority were employed all day long in hammering rivets on the plates which form the sides of ships, and fastening them in this way to the iron ribs. The consequence of the continual use of these many hundred hammers at once on the hollow iron sides of the vessels, was, as one of the witnesses said, to keep up a continual peal of thunder. Another said it seemed as if all the demons of the infernal regions had broken loose; and they all described it as being intolerable and dreadful, even those who were residing as much as a mile from the spot. It was said, however, not to amount to any great annoyance when the windows were closed, but was chiefly objectionable in the grounds, or when the windows were open. It was said that, in case of sickness, it would be necessary to remove the patient to some more quiet spot; but no instance was given where such a course had been adopted. Some of those, however, who used the strongest terms as to the extent and degree of the nuisance, were those who resided at the greatest distance. Mr. Lawrence, mayor of Liverpool during the past year, whose grounds immediately adjoined, stated that he had permitted the defendants to run some iron bolts through the wall dividing them from his plantation, for the purposes of their trade. The noise was unpleasant. There had been a wood ship-building yard in the neighborhood before. The noise from that was not annoying, but the chief grievance arose from the men trespassing. In the works now in question, there was no annoyance of that kind. Nothing could be more properly conducted.

It appeared during the investigation that the docks are rapidly extending in the direction of the Dingle, which itself, from its situation and the depth of water, would be an eligible site for that purpose. Any further dock extension must be in that direction, as it will be impossible with safety to extend them much further to the north. It appeared also, that the population of Toxteth-park, close adjoining the Dingle, has increased most rapidly of late years, and amounts now to 40,000, or thereabouts. The whole

population of Liverpool (which in 1795 was only 60,000) was now about 300,000. It was also proved that, between the spot where the defendants had set up their establishment and the town of Liverpool, there was not a spot available for such a business which was not already appropriated for public purposes.

Mr. Serjeant *Wilkins* (with whom was Mr. *Atherton*) addressed the jury for the defence, contending that the "unpleasantness," which some of the witnesses described, did not amount to anything which could render the defendants liable in the present indictment for a nuisance. The language used by the others was no doubt very much exaggerated, and dictated by angry and prejudiced feelings. It was not possible, in a large and growing community, such as that of Liverpool, that these gentlemen could preserve for their mansions, which they had erected in its immediate neighborhood, that rustic privacy which they once perhaps possessed. From the description of his learned friend, Mr. Knowles, one would have imagined it was the vale of Avoca, or the happy valley of Rasselas, which was realized at the Dingle, while, in truth, it appeared from the evidence, that the Dryads and Hamadryads had long before been scared away by noisy ship-building yards, smoky steamers, forges with their seven-ton hammers, and the noise and smoke and bustle of a rapidly increasing population of 300,000 souls. He contended that this was an attempt, he trusted a vain one, to limit the progress and fetter the energies of a community increasing in numbers and importance more quickly than any in the empire, and which, in all probability, standing as it did between the old and the new worlds, and carried forward by the energies and enterprise which had already made it what it was, was likely soon to be second to none in Europe.

Mr. *Knowles*, Mr. *Martin*, and Mr. *Crompton* conducted the prosecution.

Patteson, J., in summing up, said, that the nuisance charged in the present instance was alleged to be caused by certain noises and smokes created by the defendants; and these, no doubt, might amount to a nuisance. To find the defendants guilty, they must be satisfied there was something more than what was merely disagreeable; but it would amount to a nuisance if it rendered the habitations of the persons in the neighborhood substantially less comfortable than they were before, although it should not be dangerous to health, or hurtful to human life. Nor was it suffi-

cient that it should prejudice two or three individuals only. It must, to be a nuisance, reach the neighborhood in general. If they were satisfied, so far as these two points went, that it was a nuisance, it would not be less so because it was a trade beneficial to the parties carrying it on, or to the town of Liverpool, or the community at large. They could not set off those advantages so as to render it less a nuisance. This position he (the learned judge) had laid down in a case tried here some years ago, — "The Queen *v.* Muspratt," — an indictment against some alkali works; and the law so laid down had not been questioned. They would take into consideration the evidence which had been given of the existence of other works, productive of somewhat similar annoyances, in the neighborhood, which, so far as it went, would tend to show that this, in that neighborhood, was not a nuisance, unless there was to be traced to it some new and greater inconvenience and annoyance than had existed before. He would only add that, in this, as in every criminal case, they would strictly examine the evidence, and be fully satisfied in their own minds of the guilt of the defendants, before they would convict them.

The jury, after retiring for a short time, returned a verdict of *Not Guilty*.

Bail Court, Sittings in Banco, London, June, 1846.

CLUTTERBUCK *v.* HULES.

Attorney; — Arrest; — Privilege.

A rule *nisi* had been obtained to discharge the defendant out of custody. The affidavits stated that the defendant was an attorney of this court, and, as such, was attending at the county court at Glocester, where he had seven actions pending. The plaintiff caused him to be arrested. The defendant contended that he was entitled to his privilege, and that he could not be arrested when he was attending the court in his professional capacity. Upon cause being shown, it was urged that the defendant was not privileged, unless he was upon the roll of the particular court, and that he was bound to show this. For the defendant, it was contended that there was nothing to show that there was any roll in the county court.

WIGHTMAN, J., took time for consideration, and, this morning, said, that, without deciding the question of the necessity of the attorney being upon the roll of the county court, even were there such a roll, he thought there was sufficient upon the affidavits in this case to justify him in ordering the defendant to be discharged. It was clear he was an attorney upon the roll of this court, and he was at the time of his arrest actually attending his professional duties in the county court. The privilege was for the benefit and protection of the clients, not for the advantage of the attorney.

Rule absolute.

Digest of American Cases.

Selections from 1 Denio's (New York) Reports.

AGREEMENT.

Where a party has been led to enter into a contract by the fraud of the other party, he may, upon discovering the fraud, rescind the contract and recover whatever he has advanced upon it, provided he does so at the earliest moment after he has knowledge of the fraud and returns whatever he has himself received upon it. *Masson* v. *Bovet*, 69.

2. The general rule is, that the party who would rescind a contract on the ground of fraud, for the purpose of recovering what he has advanced upon it, must restore the other party to the condition in which he stood before the contract was made; but where the party who practised the fraud has entangled and complicated the subject of the contract in such a manner, as to render it impossible that he should be restored to his former condition, the party injured, upon restoring, or offering to restore, what he has received, and doing whatever is in his power to undo what has been done in the execution of the contract, may rescind it and recover what he has advanced. *Ib.*

3. The defendant, being the plaintiff in a judgment, and about to cause land of the judgment debtor to be sold on execution, fraudulently represented to the plaintiff that the land to be sold was free from any prior incumbrance, when in truth it was subject to older liens to more than its value, and thereby induced him to become the purchaser at the sheriff's sale for a considerable sum, and received from him in payment of his bid the note of a third person, held by the plaintiff for a larger sum than the amount bid, giving back his own note for the balance, it was held that the plaintiff, who had immediately upon the discovery of the fraud, offered to give up the note received by him, and to assign the certificate of sale, could maintain replevin in the *detinet* against the defendant for the note so transferred to the defendant by him. *Ib.*

BANKRUPT AND BANKRUPT LAW.

A discharge under the late bankrupt act of the United States, when pleaded in bar to an action for a prior indebtedness, may be impeached and avoided on account of preferences among creditors, and of payments and transfers of property in contemplation of bankruptcy, forbidden by the *second* section of the act. *Brereton* v. *Hull*, 75.

2. Where proceedings in bankruptcy were commenced by a creditor against the debtor, but before any decree of bankruptcy they were withdrawn upon the debtor making an assignment of his property for the benefit of all his creditors, some of the creditors not concurring in the arrangement; *held*, that the assignment was nevertheless valid. *Hastings* v. *Belknap*, 190.

3. Where the defendant, after judgment recovered, instituted proceedings in bankruptcy and obtained his discharge, after which the plaintiff issued execution, which was levied on the personal property of the defendant, who moved to set it aside on the ground of his discharge, and the plaintiff in opposing showed facts tending to prove that it was fraudulently obtained; the court *ordered* that the execution be set aside, unless the plaintiff in a given time would bring an action on the judgment to enable the defendant to set up the discharge; and on his doing so, the execution and levy to stand as security, but proceedings on them, in the

mean time, to be stayed. *Bangs* v. *Strong*, 619.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Where a note was made payable to "E. Moore, assignee of J. K. Van Ness," *held* that an indorsement by the payee, of his name without the addition, was sufficient, and passed the whole interest of the payee in the note. *Bay* v. *Gunn*, 108.

2. Where the indorsee and holder of a promissory note indorsed it to the plaintiff as collateral security for a debt of a less amount, due at a future day, and took the plaintiff's receipt for it, by which he agreed to return it upon payment of the debt, for which he took it as security, and to use all legal means to collect it if so directed by the party who transferred it to him; *held*, that the plaintiff could sue the maker on the note before the debt, for which he received it, had become due, without the direction of the party who transferred it to him. *Ib.*

3. The legal presumption is, that a promissory note is given in the course of business and for value, and that it is to be paid by the maker as the primary debtor. *Bank of Orleans* v. *Barry*, 116.

4. The holder of a note made by a principal debtor and sureties, by an arrangement with the principal suffers the signature of one of the sureties to be erased; the note is still valid against such principal. *The People* v. *Call*, 120.

5. Where, in a suit by the payee of a bill or note, the paper had been specially indorsed by the plaintiff to another, and there was no re-transfer by such other person, but the indorsement had been stricken out before the paper was offered in evidence; *held*, that the plaintiff was entitled to recover without explaining the indorsements or showing that they were made to create an agency for the purpose of collection. *Dollfus* v. *Frosch*, 367.

6. Commercial paper payable in France, on a certain day named, will, in the absence of any proof respecting the law of that country, be held payable on the third day of grace. *Ib.*

7. Where the drawer of a bill of exchange had no funds in the hands of the drawee, but was on the contrary indebted to him at the maturity of the bill; *held*, that the drawer, in an action on the bill, could not object the want of a due presentment of it for payment, and of notice of its dishonor, though there had been prior transactions between the drawer and drawee, and the former had before drawn on the latter, it appearing that when the bill in controversy matured the accounts between the parties were unsettled and in litigation. *Ib.*

8. The indorsee of negotiable paper given to the payee for a simple contract debt, by a corporation whose stockholders are by its charter personally liable for its debts contracted while they were such stockholders, can maintain an action upon the statute in his own name for the debt against one who was a stockholder when it was contracted. *Freeland* v. *McCullough*, 414.

9. The defendant, for the accommodation of the plaintiff, made a promissory note payable to him in one year, without words of negotiability, and at the same time took from him an agreement to indemnify him against it; and the maker and payee then left it with a third person to be delivered to C., which was done; but there was no evidence upon what account or for what consideration it was delivered to C.; *held*, in an action on the note at the suit of the payee, that the defendant was not responsible for the want of proof that C. received it for a valuable consideration. *Lee* v. *Swift*, 565.

10. Where a promissory note indorsed by the payee, for the accommodation of the maker, is negotiated by the latter in violation of an agreement between them, the holder cannot recover against such indorser unless he received the note in good faith, for a valuable consideration and without notice of the arrangement. *Small* v. *Smith*, 583.

11. Where the holder of a note received it from the maker with notice that the indorser had become such under some arrangement or condition which had not been complied with; *held*, that he took it subject to such arrangement; and it appearing that the indorsement was made on condition that it should not be used until a par-

ticular act beneficial to the indorser had been performed, which had not been done; *held further*, that the holder could not recover against the indorser. *Ib.*

12. A bank at which a promissory note was made payable, received it from the holder for collection, and having an account with the maker, which was not however good for the amount, charged it to him and paid it to the holder, at the same time placing upon it a cancelling mark, which by the practice of the bank only denoted that it was charged. In a suit on the note by the bank as indorsee against the maker, *held*, that it was a subsisting security in the hands of the plaintiff, and authorized a recovery. *The Waterlliet Bank* v. *White*, 608.

13. *So held* where the note was made for the accommodation of an indorser upon it, who was *cashier* of the bank at which it was payable, and had promised the maker to provide for it. *Ib.*

14. Where a note is indorsed *in blank* by the payee, and is afterwards transferred by an indorsement *in full*, it is still transferable by delivery, and a party to whom it is so transferred may make title by filling up the blank indorsement to himself, and striking out the subsequent ones. *Ib.*

15. An indorsement of a note in full, made to create an agency for its collection, may be stricken out by the holder. *Ib.*

16. An indorsement of a note by the holder in these words, "Pay to E. O., cashier, or order," made upon the purchase of it by the bank of which E. O. was cashier, is a legal transfer of the note to the bank. *Per Jewett*, J. *Ib.*

CARRIER.

It is a general rule that a common carrier is bound to deliver the goods entrusted to him to carry, personally, to the consignee at the place of delivery; but in certain cases where the transportation is by vessels or boats, notice of the arrival and place of deposit is sufficient, and comes in place of a personal delivery; and where goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, *or is not known, and cannot after reasonable efforts be found*, the carrier may discharge himself from further responsibility, by placing the goods in store with some responsible third person in that business, at that place, for and on account of the owner. In such a case, the storehouse keeper becomes the agent or bailee of the owner of the property. *Fisk* v. *Newton*, 45.

2. Where the consignee of certain kegs of butter sent from Albany to New York by a freight barge was a clerk, having no place of business of his own, and whose name was not in the city directory, and who was not known to the carrier, and after reasonable inquiries by the carrier's agent could not be found, it was held that the carrier discharged himself from further responsibility, by depositing the property with a storehouse keeper, then in good credit, for the owner, and taking his receipt for the same, according to the usual course of business in that trade, though the butter was subsequently sold by the storehouse keeper, and the proceeds lost to the owner by his failure. *Ib.*

CASES OVERRULED, DOUBTED OR EXPLAINED.

Dow *v.* Stall, (5 Hill, 186,) and Fanning *v.* Trowbridge, (5 Hill, 428.) *Thompson* v. *Sayre*, 175.

The Mayor, &c. of New York *v.* Furze, (3 Hill, 612.) *Wilson* v. *The Mayor, &c. of New York*, 595.

Bohannan *v.* Peterson, (9 Wend. 503.) *Stage* v. *Stevens*, 267.

Harvey *v.* Skillman, (22 Wend. 571.) *Bullock* v. *Bogardus*, 276.

DAMAGES.

Where a lessee for years covenanted that the buildings which he should erect, should at the expiration of the term revert to the lessor "without damages of any kind except the natural wear of the same," and a building so erected was destroyed by means of the negligent acts of a third party, *held* that it was waste for which the tenant was responsible to the lessor, and that the lessee or his assignee, in an action against the party guilty of the negligence, was therefore entitled to recover the whole value of such building. *Cook* v. *Champlain Transportation Co.* 91.

EVIDENCE.

Upon the trial of an indictment for rape, the declarations of the injured female, made immediately after the alleged offence, are not admissible evidence for the prosecution to prove the offence committed; and the rule is the same though it appear that she is incompetent to testify on account of immature age, idiocy, or other mental defect. *The People* v. *McGee*, 19.

2. Such declarations are only competent where the party injured has given evidence as a witness, and then only upon the question of her credibility. *Ib.*

3. Where the injured person is of sufficient age and of competent though weak understanding, but is unable to talk, and can communicate and receive ideas only by signs, she may yet be sworn as a witness, and examined through the medium of a person who can understand her, who is to be sworn to interpret between her and the court and jury. *Ib.*

4. Upon the trial of an indictment, an *accomplice* in the commission of the offence is a competent witness for the prosecution; and the testimony of a witness thus situated, will, if the jury are fully convinced of its truth, warrant the conviction of the defendant, though it be uncorroborated by other testimony. *The People* v. *Costello*, 83.

5. The uncorroborated testimony of an accomplice should be received with great caution, and the court should always so advise the jury; but they are not to be instructed that in point of law a conviction cannot be had upon such testimony. *Ib.*

6. The prosecution is not entitled, upon the trial of an indictment, to give in evidence an anonymous letter, written by a stranger, though a witness for the prosecution had spoken of it on the direct examination, and had been cross-examined concerning the circumstances under which it was received by the defendants' counsel, its contents not having been disclosed on such examination. *Ib.*

7. In an action by indorsee against the makers of a promissory note indorsed by the payee and by another person, the first indorser, being released by the plaintiff, is a competent witness in his behalf. *Bay* v. *Gunn*, 108.

8. A party is not entitled to ask the *opinion* of a professional witness upon any question, except one of skill or science. *The People* v. *Bodine*, 281.

9. Where, upon the trial of an indictment for murder, a witness for the prosecution, who resided in the same house with the prisoner, was examined as to her declarations and conduct for several successive days subsequent to the murder, and in the course of such examination, related his own occupation and conduct during that time, which had no apparent bearing upon the questions in issue, and the prisoner's counsel objected to all evidence of the independent conduct of the witness during that time, which objection was overruled, and the witness continued to give an account of his own conduct in connection with the prisoner's acts and declarations — but the bill of exceptions, instead of detailing the whole of the witness's testimony, was confined to what he said respecting himself: *Held*, that the objection was too broad, and could not be sustained — that it should have specified the particular acts of the witness, which were objected to by the prisoner and insisted upon by the prosecution — or the whole of the witness's testimony should have been given to enable the court to judge what particular parts were objectionable. *Ib.*

10. Although a witness who has given testimony, is privileged from answering whether he has not on a former occasion sworn differently, neither the court nor a party can object where the witness does not; and where, upon such a question being put, the court without any objection by the witness excluded it, it was held erroneous. *Ib.*

11. Where on the trial of an indictment for murder the evidence was circumstantial, and the judge instructed the jury that fair character was important to the prisoner, and that they were to inquire "*why it was that she had given no evidence of her general character?*" *Held*, that such instruction suggested the inference that her character was bad, and was erroneous. *Ib.*

12. Where no evidence of general character has been given, the subject of character is not one for the consideration of the jury. *Per Beardsley*, J. *Ib.*

13. Where on a trial for murder, there was evidence that a murder had been committed, and that the house in which the dead body was, had been subsequently set on fire under such circumstances as to raise a suspicion that the same was done by the perpetrator of the murder to conceal that offence, and the evidence left it doubtful whether the prisoner was in the vicinity of the house when the fire was set, and the court charged the jury that if the prisoner *might* have been at the scene of the fire, "the *onus* was cast upon her to get rid of the suspicion which thus attached to her," and that she was bound to show where she was at the time of the fire. *Held* erroneous. *Ib.*

14. Where a witness called to establish the defence of usury, declines to testify on the ground that his evidence may expose him to an indictment, or subject him to a penalty, and it appears that the statute of limitations has barred all prosecutions, the court is bound to pronounce against his claim to exemption. *Close* v. *Olney*, 319.

15. Where the period of limitation has elapsed since the making of the usurious agreement, but it does not appear but that the usurious premium may have been received within the period of limitation, the witness may be compelled to disclose the absence of an offence within the period of limitation, by an examination for that purpose, so conducted as not to infringe his privilege. *Ib.*

16. Proof by comparison of hands, i. e., the juxtaposition of two writings in order to ascertain whether both were written by the same person, is inadmissible. *The People* v. *Spooner*, 343.

17. A witness who was a clerk in chancery, and who testified that he had been accustomed to examine signatures as to their being genuine, is not entitled to give an opinion as a person skilled in detecting forgeries, whether a signature is genuine or imitated. *Ib.*

18. *It seems*, that the rule sometimes allowed to prevail, admitting *experts* to give an opinion whether a signature is genuine or imitated, is not well established upon authority, and that such testimony is incompetent. Per *Bronson*, C. J. *Ib.*

19. The seal of another state affixed to a copy of an act of its legislature, for the purpose of authenticating the same pursuant to the act of congress prescribing the mode of authenticating the public acts of the several states, proves itself and imports absolute verity, and is presumed, until the contrary appears, to have been affixed by the proper officer. Per *Bronson*, C. J. *Coit* v. *Millikin*, 376.

20. Such seal, however, to be recognized in the courts of this state, must be a common law seal, *i. e.*, an impression upon wax or other tenacious substance: an impression upon paper alone will not answer. *Ib.*

21. A party signing a written instrument with his *initials*, intending thereby to bind himself, is as effectually bound as he would be by writing his name in full. *Palmer* v. *Stephens*, 471.

22. It is competent, however, where the suit is between the original parties, for one whose initials, or full name, appear to a note or obligation, to show that he placed it there to attest the execution of the instrument, or for any other lawful purpose, and not as maker of the instrument. Per *Beardsley*, J. *Ib.*

23. Where a promissory note purporting, from the words "*we* promise," &c., to be the note of more than one person, was signed in the first place with the name of a single individual, under which name were written the initial letters of the defendant's name, which were proved to be in his handwriting; *held*, that the defendant was presumptively a joint maker; and also that such presumption was not overcome or impaired by proof that the first signature was likewise in the defendant's handwriting. *Ib.*

24. That a witness for the prosecution in a criminal case has contributed funds to carry it on, goes only to his credibility. *The People* v. *Cunningham*, 524.

25. On the trial of an indictment containing a single count for one offence of assault and battery, and resisting an officer in the execution of process, the prosecution, after proving an assault and one act of resistance, cannot give evidence of a similar offence committed at another time. *The People* v. *Hopson*, 574.

26. Where there is a question of intent, or of guilty knowledge, proof of other acts of a similar nature with those constituting the principal charge, with a view to establish such intent or knowledge, are sometimes admissible. Per *Bronson*, C. J. *Ib.*

27. On the trial of an indictment for resisting a constable while engaged in executing process against the defendant's property, the defendant is not entitled to show that the officer had not taken the oath of office, or given the security required by law; it being sufficient in such a case that the party was an officer *de facto*. *Ib.*

28. *It seems* the rule would be otherwise in a private action brought by the officer for the assault. Per *Bronson*, C. J. *Ib.*

29. It clearly would be where he sues for fees, or sets up a title to property by virtue of his office. This can only be done by one who is an officer *de jure* as well as *de facto*. Per *Bronson*, C. J. *Ib.*

30. On the trial of an indictment for the murder of a wife by her husband, the declarations of the deceased made *in extremis* as to the cause of her death, are competent evidence against the prisoner. *The People* v. *Green*, 614.

31. *So held* by the chancellor and judges, their opinions being required by the governor pursuant to the statute. *Ib.*

FIXTURES.

Engines and machinery in a mill, though firmly affixed to the building, are, when so affixed by tenant for years, for the purpose of carrying on a business of a personal nature, the personal property of such tenant. *Cook* v. *The Champlain Transportation Company*, 91.

FRAUDS, STATUTE OF.

An agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, is *a contract for the sale of an interest in lands*, and to be valid must be in writing. *Green* v. *Armstrong*, 550.

2. The distinction, on this subject, is between growing trees, fruit or grass and other natural products of the earth on the one hand, and growing crops of grain and other annual productions raised by cultivation of the earth and the industry of man on the other. The former are parcel of the land, and a contract in writing is required to make a valid transfer; the latter are personal chattels, and not within the transfer. Per *Beardsley*, J. *Ib.*

IMPRISONMENT.

An attorney prosecuted in *assumpsit* for not paying over money collected for his client is liable to imprisonment — such suit being an action *for misconduct in a professional employment*, within the exception in the second section of the act to abolish imprisonment for debt, and consequently the defendant may be held to bail on the *capias* in such action. *Stage* v. *Stevens*, 267.

2. The *dictum* to the contrary in *Bohannan* v. *Peterson*, (9 Wend. 503,) overruled. *Ib.*

INFANT.

Although the deed of an infant is voidable only and not void, yet where an infant *feme covert* joined with her husband in a conveyance of lands of which *he* was seised in his own right: *held*, that her conveyance was void, she having then no estate in the lands; and that having survived her husband, she could maintain ejectment for her dower notwithstanding her conveyance, though she had arrived at full age, and had done nothing to disaffirm it. *Sherman* v. *Garfield*, 329.

2. An infant is liable for money paid at his request to satisfy a debt which he had contracted for necessaries. *Randall* v. *Sweet*, 460.

3. An infant is not liable for money borrowed, though expended by him for necessaries, nor for money borrowed to buy necessaries, where it was not so applied; but he is liable where the lender sees that the money is laid out for necessaries, in the same manner that he would be if the necessaries had been furnished directly by the lender. Per *Bronson*, C. J. *Ib.*

4. An infant is likewise liable for money paid to procure his liberation from arrest on execution; and also on mesne process, where the arrest was for necessaries. Per *Bronson*, C. J. *Ib.*

JUDGMENTS AND EXECUTIONS.

It seems that the act to exempt certain property from distress for rent and sale on execution, (Stat. 1842, p. 193,) does not affect executions for debts contracted before its passage: but if it admits of that construction;

2. *Held*, that it conflicts with the provision in the constitution of the United States, forbidding any state to pass a law impairing the obligation of contracts, and is so far void. *Quackenbush* v. *Danks*, 128.

3. Under the statutes exempting certain *necessary* articles from distress for rent and levy and sale under execution, the question whether a given article was necessary, is one of fact and not of law; and where the jury found that a *clock* owned by a householder was not exempt, *held* that the verdict could not be disturbed on *certiorari*. *Willson* v. *Ellis*, 462.

4. Where a sheriff seizes and sells the personal property of one person upon an execution against another, an action will not lie against the plaintiff in the execution, who did not direct and has not assented to the seizure or sale. *Averill* v. *Williams*, 501.

5. Where a *fi. fa.* is delivered to a deputy sheriff with instructions from the plaintiff to depart from his duty in executing it, (*e. g.* to make a levy, and to do nothing more until further instructions are given,) the deputy ceases to be the servant of the sheriff and becomes the agent of the party, and the sheriff is not answerable for his acts or defaults. *Mickles* v. *Hart*, 548.

6. Where, after such instructions, the plaintiff in the execution wishes to change that relation and restore the liability of the sheriff, he must give notice to the sheriff himself. Fresh instructions to the deputy will not be sufficient. *Ib.*

7. Whether the sheriff would be liable in respect to such process even after notice given directly to him, *quere*. Per *Bronson*, C. J. *Ib.*

8. The plaintiff's attorney delivered a *fi. fa.* to a deputy sheriff with written directions to make a levy, and take no other steps until further instructions; and after five months had elapsed, directed the deputy to sell; in *case* against the sheriff for not collecting the money, *held*, that he was not answerable even in respect to property levied on by the deputy, which was carried off after the instructions to sell. *Ib.*

JURY.

Upon a challenge to a juror *for favor*, any fact or circumstance from which bias or prejudice may justly be inferred, although weak in degree, is admissible evidence before the triers. *The People* v. *Bodine*, 281.

2. Upon the trial of such a challenge, it is erroneous to reject all evidence, except such as goes to establish a fixed and absolute opinion touching the guilt or innocence of the prisoner. *Ib.*

3. A fixed opinion of the guilt or innocence of the prisoner, though it may be necessary to sustain a challenge for principal cause, need not be proved where the challenge is for favor. A less decided opinion may be shown and exhibited to the triers, who must determine upon its effect. *Ib.*

4. A juror challenged for favor who is examined before the triers, may be asked whether he ever thought the prisoner guilty; or what impressions statements which he had heard or read respecting the evidence had made upon his mind. *Ib.*

5. So *it seems*, an opinion imperfectly formed, or one based upon the supposition that facts are as they have been represented, may be proved before the triers upon such a challenge. Per *Beardsley*, J. *Ib.*

6. Where the matter alleged against one who is drawn as a juror, is in judgment of law a disqualification, the challenge is for principal cause, and is entered on the record: where the objection is not *per se* a disqualification, the challenge is for favor, and is made *ore tenus*. In the former case, where the facts are ascertained, it is to be determined by the court; in the latter, the question is one of fact for the decision of the triers. Per *Beardsley*, J. *Ib.*

7. The causes of challenge for favor are very various, and not subject to precise definition. The question is to be submitted as a question of fact upon all the evidence to the conscience and discretion of the triers, whether the juror is indifferent or not. *Ib.*

8. Where upon a challenge for favor the court err in admitting or rejecting evidence, or instructing the triers upon matters of law, a bill of exceptions lies. *Ib.*

9. The remedy would be the same if the court should overrule such a challenge when properly made, or refuse to appoint triers. Per *Beardsley*, J. *Ib.*

10. The fact that a prisoner did not avail himself, as he might, of a peremptory challenge to exclude a juror who was found indifferent upon a challenge for cause, does not prevent him from taking advantage of an error committed on the trial of the challenge for cause, though it appears that his peremptory challenges were not exhausted when the empanelling of the jury was completed. He is entitled to have his challenges for cause determined according to law, and to make or withhold his peremptory challenges according to his pleasure. *Ib.*

LANDLORD AND TENANT.

Where a tenant under a demise for a year or more holds over after the end of the term without any new agreement with the landlord, he may at the election of the landlord be treated either as a trespasser, or a tenant holding upon the terms of the original lease. Distraining for rent payable after the expiration of the original term, is an election by the landlord to consider him a tenant. *Conway* v. *Starkweather*, 113.

2. The tenant has no such election, and after holding over, is not at liberty to deny that he is in as tenant, if the landlord chooses to hold him to that relation. *Ib.*

3. Where the tenant, before the expiration of his term, communicated to the landlord his determination not to keep the premises another year, but nevertheless remained in possession a fortnight after the expiration of the term; *held*, that such continuance in possession, notwithstanding what had taken place, enabled the landlord to treat him as a tenant. *Ib.*

4. Where the goods of M. were taken in execution, and a notice given by a landlord to the sheriff, with a view to obtain payment of rent, stated, among other things, that a certain sum was due from M. as rent for the use and occupation of certain premises which were described, *then occupied by M.*; *held*, that the notice was defective, for not showing that the rent was due from M. *as tenant*. *Camp* v. *McCormick*, 641.

LARCENY.

Although every larceny includes a trespass, and cannot exist unless there has been a taking from the possession of another, yet where one having only the *care*, *charge* or *custody* of property for the owner, converts it, *animo furandi*, it is larceny; the possession, in judgment of law, remaining in the owner until the conversion. *The People* v. *Call*, 120.

2. So, where the holder of a promissory note, having received a partial payment from the prisoner, who was the maker, handed it to him to indorse the payment, who took it away and refused to give it up; *held*, that the possession remained in the owner, the prisoner acquiring only a temporary charge or custody for the special purpose; and that his subsequent conversion, the jury having found it felonious, was larceny. *Ib.*

3. In such a case, it is not essential that a felonious intent should exist when the prisoner received the note. It is enough if he converted it *animo furandi*. *Ib.*

LEASE.

A condition in a lease for years, that upon the neglect of the lessee to pay rent, or upon any other failure to perform on his part, the lease shall *cease and determine*, *or become null and void*, does not render the lease absolutely void upon a default in performing the condition, but voidable only, at the election of the lessor; if he elect to waive the forfeiture, the lessee is bound as though no breach of the condition had occurred. *Clark* v. *Jones*, 516.

2. The rule is the same in respect to conditions in leases for lives. Per *Bronson*, C. J. *Ib.*

3. The principle is equally applicable where there is a surety bound with the lessee for the performance of the covenants on his part. *Ib.*

4. The plaintiffs' testator leased certain premises to R. for a term of years,

at a rent of $3300 *per annum*, payable quarterly, the rent to be secured by the bond of the lessee with a sufficient surety in the sum of $3300, with a condition that the lease should *cease and determine* if the rent should be in arrear for thirty days after any day of payment; that upon such failure to pay rent, the bond should be forfeited, and the amount of $3300 should be paid, and be considered liquidated damages for the non-performance. A bond was executed, in compliance with the conditions of the lease, with the defendant as surety, conditioned that R. should pay the rent reserved during the continuance of the lease. Rent being in arrear, the lessor prosecuted the bond, assigning breaches for the non-payment of rent accruing prior to the commencement of the suit, and recovered judgment. On *scire facias* on this judgment, setting forth these facts, and assigning further breaches for the non-payment of rent falling due subsequent to the former suit, to which the defendant demurred; *held*, that the lessor having elected to waive the forfeiture by suing for the rent, the defendant could not set it up, and that the plaintiffs were entitled to judgment. *Ib.*

5. *It seems*, that if the lessor had brought ejectment for the first default, he might in a suit on the bond have recovered the amount stated as liquidated damages. Per *Bronson*, C. J. *Ib.*

6. A bargain for *rooms* in a boarding house with board for the person hiring the rooms is not a lease of real estate, and does not create the relation of landlord and tenant between the parties. *Wilson* v. *Martin*, 602.

LIBEL.

The definition of a libel, sanctioned by the court in *Steele* v. *Southwick*, (9 John. R. 214,) approved. Per *Jewett*, J. *Cooper* v. *Greeley*, 347.

2. A publication stating that the plaintiff is about to commence a suit for a libel, but that he will not like to bring it to trial in a particular county, *because he is known there*, is libellous. *Ib.*

3. Such a publication amounts to a charge that the plaintiff is in bad repute in the county referred to. *Ib.*

LIMITATIONS, STATUTE OF.

Where the debtor resides out of this state at the time the cause of action accrued, and never returns, but dies abroad, the statute commences to run only from the time of the granting of letters testamentary or of administration in this state. *Benjamin* v. *De Groot*, 151.

2. In assumpsit against several defendants, it is no answer to a plea of the statute of limitations that one of them, within six years from the accruing of the cause of action, departed from this state, and continued absent until the commencement of the suit. *All* the persons liable upon a joint contract must depart from the state in order to arrest the running of the statute against the demand. *Brown* v. *Delafield*, 445.

3. The rule is different in actions for torts; there the cause of action being several, the plaintiff can avail himself of the saving provision against any party who has resided out of the state during the period of limitation. Per *Beardsley*, J. *Ib.*

MORTGAGE.

An assignment of a mortgage by an individual or a corporation, without seal, is a valid transfer of the mortgage debt. Per *Bronson*, C. J. *Gillet* v. *Campbell*, 520.

NUISANCE.

Every injury caused by a continuance of a nuisance, affords a new and distinct cause of action. Per *Beardsley*, J. *Vedder* v. *Vedder*, 257.

2. A purchaser may maintain an action for the continuance of the nuisance erected before his purchase, and an heir for the continuance of one erected in the time of his ancestor. Per *Beardsley*, J. *Ib.*

3. The writ of nuisance is an obsolete proceeding, and is not to be encouraged; and the court will not, therefore, in such a proceeding, relax the strictness of the ancient practice. *Kintz* v. *McNeal*, 436.

4. A party cannot defend an indictment for nuisance by showing its continued existence for such a length of time as would establish a prescription against individuals. *The People* v. *Cunningham*, 524.

Notices of New Books.

THE INSOLVENT LAWS OF MASSACHUSETTS, WITH NOTES. By JOSEPH CUTLER, of the Boston Bar. Boston: Benjamin B. Mussey, 1846. pp. 108.

The legislature of Massachusetts, by a resolve of March 18, 1831, appointed Messrs. Charles Jackson, Samuel Hubbard and John B. Davis, commissioners "to consider," amongst other things, "the expediency of providing by law for a more equal and equitable distribution of the estates of insolvent debtors." On the 31st of May, 1831, these gentlemen reported to the legislature, then in session, a bill which was afterwards, in 1838, enacted as the law familiarly known as the Insolvent Law. Since that time, at every session of the legislature, this law has been the subject of more or less discussion and debate. And by statute of March 3, 1842, it was expressly suspended, except the twentieth section, so long as the bankrupt law of the United States, 1841, should remain in force. Various acts have, since the original law went into operation, been passed, to remedy the supposed defects in its practical operation. Under all these laws, which now constitute, in fact, both a bankrupt and insolvent system for this state, important and intricate questions have been discussed and decided in the courts of this state, and in the courts of the United States, for the District of Massachusetts.

In the small octavo whose title we have copied, Mr. Cutler, who seems to have carefully examined all the decisions, has, in the notes under each clause of the statute which has been the subject of judicial decision, given, in a concise, neat and accurate form, all the points passed upon by the courts from the period when the law first went into operation to the present time.

We have thus in a convenient form, all the statutes on the subject of insolvency, with marginal references from one statute to another, wherever they relate to the same subject, and in the notes the substance of all the decisions, which have been made upon their construction, application and limitations. Added to this are full and accurate forms for the various proceedings under the statutes.

The editor has thus rendered an essential service, not only to the legal profession, and to those on whom is devolved the administration of these laws, and to all who, as insolvents, or creditors of insolvents, are directly affected by their operation, but he has also rendered clear and intelligible, to all who are desirous of understanding the existing laws on this subject, what are the merits and defects of the present system.

The want of a work like this has long been felt, as nothing of the kind has heretofore been undertaken, except a small work of Mr. Cushing, now one of the judges of the common pleas, which was published before the law of 1838 went into operation. By a reference to Mr. Cutler's work, we perceive that in the preparation of the notes, he has examined all the cases in Pickering, in the nine volumes of Metcalf, in the two volumes of Story, and in the preceding numbers of the Law Reporter.

PENNSYLVANIA STATE REPORTS, CONTAINING CASES ADJUDGED IN THE SUPREME COURT DURING PART OF MAY TERM, JULY TERM, AND PART OF SEPTEMBER TERM, 1845. Vol. I. By ROBERT M. BARR, State Reporter. Philadelphia: T. & J. W. Johnson. 1846.

There is nothing in this volume to show by what authority there is a change in relation to the reports in the supreme court of Pennsylvania; but we are informed by the May number of the Pennsylvania Law Journal, that by an act of 1845, the governor is required to appoint and commission a person of known integrity and learning in the law, to be reporter of the decisions of the supreme court of the state. Under this act, Robert M. Barr, Esq., of Reading, received the appointment, and we now have the first fruits of his labor. From the slight examination which we have been able to give the present volume, we should judge that the appointment was a judicious one. In all that relates to its mechanical appearance, it is in the highest degree creditable to the publishers.

Whether the experiment of having a state reporter will prove acceptable to the profession in Pennsylvania, remains to be seen. The advantage of having an authorized reporter is, that confidence may be placed in his reports as containing exactly what the courts decide, the opinions usually being drawn up by the judges themselves. The *disadvantages* are, the tedious length, the endless discussions of collateral points, and the essay-like character of the decisions, "sweetness long drawn out," which are apt to characterize those opinions which are to be published under the sanction of the courts themselves. The main point, (the "bite," as some would say,) of a case, may usually be stated in a few words, and this can lead to no uncertainty or confusion; but we should be glad to see the man who can tell how much litigation has been caused by the dicta of judges, the unnecessary statements, the doubts, the *quæres*, and the suggestions, with which opinions "carefully drawn up," are apt to abound. Some of the best English reports are those which have been taken at the bar by "unauthorized" reporters; inasmuch as no man, at all accustomed to the business, can fail to seize upon the point decided, if he has heard the whole case, pleadings and all, and at the same time the course of reasoning, the illustrations and the suggestions, are forgotten or excluded. We are bound to say, however, that none of the faults above mentioned can be attributed to the chief justice of Pennsylvania. We are sure that no reporter could give his opinions in a more condensed form than he does himself. Perhaps it would not be too much to apply to the condensed energy of his style, the remark of a learned judge respecting Chief Justice Parsons, in *Deblois* v. *Ocean Insurance Company*, (16 Pick. R. 310): "As light and spongy fabrics are reduced to portable size by hydraulic pressure, so the verbose readings of the law were, by the force of his great mind, reduced to clear practical rules."

A TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN. In Five Parts. By CHARLES, LORD TENTERDEN, late Chief Justice of England. The Seventh English Edition, by WILLIAM SHEE, Serjeant at Law. The Fifth American Edition, with Notes of MR. JUSTICE STORY, and Additional Annotations, by J. C. PERKINS, ESQ. Boston: Charles C. Little and James Brown. 1846.

This is truly a magnificent volume, of more than a thousand pages, containing the treatise of Lord Tenterden, or Mr. Abbott, as he is better known, with the additions of Serjeant Shee, and the notes of Judge Story and Mr. Perkins. In all that relates to the mechanical execution, tables of cases, index, annotations and appendix, this is incomparably the best edition of "Abbott on Shipping" that has ever been published.

This work was originally published in 1802. The second American edition, published in 1810, was enriched by the elaborate and carefully prepared notes of Judge Story, then at the bar. It was again published in 1822, at Exeter, N. H., with an appended index or digest of subsequent American cases; and in 1829, the volume now most generally in use was prepared by Judge Story, in which all the cases since 1810 were incorporated into the notes. Mean-

while there had been several editions in England, of which the seventh, containing the additions of Mr. Shee, is the most valuable. In addition to all these labors, the American publishers have now secured the valuable notes of Mr. Perkins. We have no doubt that the volume will find great favor with the profession, for no practitioner who has occasion to consult works on commercial law, can afford to be without it.

Reports of Cases Adjudged in the Supreme Court of Judicature of the State of New York; from January Term, 1799, to January Term, 1803, both inclusive; together with Cases determined in the Court for the Correction of Errors, during that period. By William Johnson, Counsellor at Law. Second Edition; with many Additional Cases not included in the former Edition, from the Original Notes of the late Hon. Jacob Radcliff, one of the Judges of the Supreme Court, during the time of these Reports. With Copious Notes and References to the American and English Decisions. By Lorenzo B. Shepard, Counsellor at Law. Volume I. New York: Banks, Gould & Co. Albany: Gould, Banks & Gould. 1846.

Johnson's Cases comprehend the decisions of the supreme court and the court for the correction of errors, from 1799 to 1803, soon after which the first regular reports were published, and no library can be considered as complete without them. Many years have elapsed since the first edition was issued, and it has passed entirely out of print. The present well-executed edition will be more valuable than the first, inasmuch as the editor has made many references to English and American authorities, and in the third volume many additional cases are to be added from the manuscript of Judge Randall. The first volume is now published; the others are promised during the present year.

New Books Received.—A Practical Treatise on the Law relating to Trustees, their Powers, Duties, Privileges and Liabilities. By James Hill, Esq., of the Inner Temple, Barrister at Law, and Fellow of New College, Oxford. With Notes and References to American Decisions. By Francis J. Troubat, of the Philadelphia Bar. Philadelphia: Lea & Blanchard. 1846.

The New Constitution of the State of Louisiana; adopted in Convention on the 14th of May, 1845, and Ratified by the People of the State on the 5th of November, 1845. With a Comparative View of the Old and New Constitutions of the State; and a Copious Index. By S. F. Glenn. New Orleans: J. C. Morgan. 1845.

In the Court of Common Pleas for the City and County of Philadelphia, Sitting in Equity. *The President, Directors and Company of the Bank of Kentucky* v. *The Schuylkill Bank in the City of Philadelphia, and Hosea J. Levis.* Opinion of the Court delivered by the Hon. Edward King, January 28, 1846. Philadelphia: John C. Clark. 1846.

A Treatise of the Law relative to Merchant Ships and Seamen. In Five Parts. By Charles, Lord Tenterden, late Chief Justice of England. The Seventh English Edition, by William Shee, Serjeant at Law. The Fifth American Edition, with the Notes of Mr. Justice Story, and Additional Annotations, by J. C. Perkins, Esq. Boston: Charles C. Little and James Brown. 1846.

Pennsylvania State Reports, containing Cases Adjudged in the Supreme Court, during part of May Term, July Term, and part of September Term, 1845. Volume I. By Robert M. Barr, State Reporter. Philadelphia: T. & J. W. Johnson, Law Booksellers and Publishers. 1846.

The Insolvent Laws of Massachusetts. With Notes. By Joseph Cutler, of the Boston Bar. Boston: Benjamin B. Mussey, 29 Cornhill. 1846.

Intelligence and Miscellany.

Judicial Salaries in Massachusetts. In 1843, the salary of the chief justice of the court of common pleas of Massachusetts, was reduced from $2100 to $1800, and that of the associate judges from $1800 to $1700. They were fixed at the first-mentioned sums in 1820, and had remained so until 1843, when the labors of the court having increased very much both in the character and amount of business before it, the salaries were reduced as above stated. Nor was this the result of the least dissatisfaction as to the judges themselves, for it was universally admitted, that the bench had never been better filled, and no tribunal in the commonwealth was more popular with the people and the bar, at the moment when the reduction took place. At the next session of the legislature, the salaries of the supreme court judges, which had also been reduced, were restored. In relation to the other judges, the legislature, with admirable consistency, adopted the cowardly policy of doing nothing, and four of the judges of the common pleas soon after resigned. The direct and immediate result of this penny-wise and pound-foolish legislation was the loss to the public of one of the best bench of judges that Massachusetts had ever had. And whilst the politicians were bawling economy (we heard it, and therefore know,) the state was losing that which money could never replace.

Meanwhile the governor and council, with lighted candles, began to hunt the community for four new judges, and at length enough were "run down" to fill the places of those who had resigned; and we again had a court which commenced under every disadvantage, but which is well entitled to the respect of the whole community.

At the last session of the legislature, another effort was made to place the salaries of these judges on a proper foundation, and the chairman of the judiciary committee of the house addressed letters to the judges, asking them to communicate any facts or opinions bearing upon the matter. The answers of the judges were received and printed, and exhibit a mortifying state of things in a commonwealth which prides itself upon paying a fair price for all services rendered by public officers. The chief justice says: "The sum of my experience is this; the duties of my office require, for their proper performance, the devotion of all my time and energies — while the salary is insufficient to meet the ordinary and reasonable expenses of myself and family." The answers of the others were to the same effect, with the exception of Judge Ward, who did not hesitate to admit that he was a bachelor, and therefore it was practicable for him to live on his salary.

Here were the facts, together with others well known, that the business of the court had increased vastly within a few years, and occupied the whole time of all the judges; and on these facts, a bill passed the house of representatives raising the salary of the chief justice to $2100 and of the associate justices to $2000. This bill went to the senate, and was there amended so as to fix the salary of the chief justice at $2100 and of the associate justices at $1800. The chairman of the judiciary committee in the senate advocated the amendment. He stated (as reported) that his yearly income from his profession was

never more than $ 1800, and he yet had laid up enough to enable him to retire from practice. Of course the learned gentleman did not inform the senate how much he had made in other ways. In marked contrast with this, was the speech of Dr. Gridley of Amherst, who in 1844 had opposed the raising of the salaries of the supreme court judges. But he was not disposed to make fish of one and flesh of another, and came out with a most admirable speech on the subject, alluding to the circumstances under which the salaries of the court were fixed in 1820, when he was a member of the house, and demonstrating, that they should be more now, from the increase of business and the greater labor and responsibility of the station. But the house finally concurred with the senate, and the salaries are as they were before the reduction in 1843. Whether the judges will hold their places, we have no means of knowing, but we trust, for the interest and honor of the commonwealth, that we shall not have another instance of judges resigning their places on account of the inadequacy of their compensation; although the blame must rest on those who refuse a suitable compensation, and not on the judges themselves.

The Hurry of the Court of Chancery. In the recent appeal of *Dungannon* v. *Smith*, in the House of Lords, the appellant, Lord Dungannon, carried over Mr. Napier, of the Irish Bar, to argue the appeal. In the course of his argument, Mr. Napier spoke of a case as having been disposed of by Sir Edward Sugden in the hurry of the court of chancery:

Lord Chancellor. — I never heard that word applied to the Court of Chancery: that it passed in the "hurry" of the Court of Chancery.

Lord Brougham. — We never speak of the speed of a broad-wheeled wagon.

Mr. Napier. — I said, my lords, in the "hurry," though perhaps I may not have expressed exactly what I mean. As far as my limited acquaintance extends in the practice of the court, on a bill and answer, where evidence is read, a question of this description, involving a mere question of law, is not disposed of with the same formality and deliberation that is usual in a court of common law, when the question is on the record.

Lord Chancellor. — It appears to have been most elaborately discussed before the Lord Chancellor. It is stated that all the cases that were cited before the vice-chancellor, were cited before him, with the addition of several which are set out in the report.

Mr. Hodgson. — I think Mr. Napier is speaking of what had occurred in Ireland in *Ker* v. *Lord Dungannon*.

Lord Chancellor. — If Mr. Napier would pay a visit to our courts he would find it different.

Mr. Napier. — I never had the honor of practising in your lordship's court of chancery, and I do not suppose I ever shall; but I should suppose, from the example I have had of the kindness and patience with which your lordships have heard me here, that I should have equal pleasure in appearing in any other court where my Lord Lyndhurst presided. But I say, my lords, the present question was not deliberately decided, &c.

Privileged Communication. — At the spring assizes, northern circuit, in England, John Crossley and John Wilde were recently indicted, the latter for knowingly uttering a forged promissory note, the former as an accessory before the fact to such uttering. It appeared that the prisoner Wilde, as agent for Crossley, had placed the note in question in the hands of a Mr. Croft, clerk to Mr. Clegg, attorney, at Oldham, for the purpose of having an action brought upon it. Mr. Croft was placed in the box to prove this fact, and at this stage of his evidence, it was objected by Mr. *Pollock*, on behalf of Wilde, that this was a privileged communication, having been made by Wilde to the witness professionally. He contended that the rule was universal, even where the client was not a party to the action then pending, *R.* v. *Withers*, (2 Camp. 578,) and that it extends to an attorney's clerk, 2 C. and P. 195, or the agent of an attorney, *Parkins* v. *Hawkshaw*, (2 Starkie,) and this, although it comes to such attorney's clerk or agent through another party, *Carpmael* v. *Powys*, before the lord chancellor, reported in *The Times* of the 27th of March, in which a number of cases were referred to in support of the position. Mr. *Hul-*

ton, in reply, submitted that this was evidence at least as against Wilde, and at present it was as against him that it was offered. It was proposed to be tendered in proof of the uttering, and that was Wilde's own act. It would be carrying the doctrine of confidential communication further than it had ever yet been carried, to say that it was not only the privilege of the client himself, but of any servant he might choose to employ.

Patterson, J., said the question was, whether the privilege was the privilege of the agent as well as the client. He had some doubts on the point, but would admit the evidence, taking care that the prisoners, in case of need, should have the benefit of the objection, should it, on further consideration, be considered valid.

Law Studies.—In the Papers of the Dublin Law Institute, we find a letter from Judge Story, and one from Professor Greenleaf, to the Principal of the Dublin Law Institute, in relation to Legal Education. In the course of Mr. Greenleaf 's letter he says : — " In our experience, the advantages of associated or collegiate instruction in the science of law, followed by six to twelve months' attention to the ' manipulations ' of practice in a lawyer's office, are beyond all comparison superior to any other method of instruction we have ever known." Judge Story says : — " I have been long persuaded that a more scientific system of legal education, than that which has hitherto been pursued, is demanded by the wants of the age and the progress of jurisprudence. The old mode of solitary, unassisted studies in the Inns of Court, or in the dry and uninviting drudgery of an office, is utterly inadequate to lay a just foundation for accurate knowledge in the learning of the law. It is for the most part a waste of time and effort, at once discouraging and repulsive. It was, however, the system in which I was myself bred ; and so thoroughly convinced was I of its worthlessness, that I then resolved, if I ever had students, I would pursue an opposite course. It was my earnest desire to assist in the establishment of another system, which induced me to accept my present professorship in Harvard University, thereby burthening myself with duties and labors, which otherwise I would gladly have declined."

The Constitution of Louisiana.— We have received a copy of the new Constitution of Louisiana, with a comparative view of the old and new constitutions of the state, by S. F. Glenn. Among the most important changes is that relating to the judiciary. The supreme court, instead of consisting of five judges, of equal dignity, and a salary of five thousand dollars per annum, will now consist of one chief justice and three associate justices, a majority of all to form a quorum. The salary of the chief justice is to be $6000 per annum, that of the associate justices $5,500. The judges are to be appointed for the term of eight years. Article 65 provides, that " when the first appointments are made under this constitution, the chief justice shall be appointed for eight years, one of the associate judges for six years, one for four years, and one for two years ; and in the event of the death, resignation or removal of any of said judges before the expiration of the period for which he was appointed, his successor shall be appointed only for the remainder of his term ; so that the term of service of no two of said judges shall expire at the same time."

We copy from Mr. Glenn's work the following remarks respecting the judiciary : " The chief reason for calling the convention together was the reform of the judiciary department of the government. For this reform there was great need. We had been laboring under an odious system until patience had ceased to be a virtue. What wrongs have been perpetrated upon us by that apparently insignificant section of the old constitution which said that the ' judiciary power shall be vested in a supreme court and *in inferior courts!* ' Of the supreme court we have nothing to say but what is grateful. As a body it is entitled to our profound respect, and its decisions justly merit the preëminent rank they have obtained in the annals of jurisprudence. But the locusts of Egypt were not a greater scourge than has been the last clause in that section to the people of Louisiana. Yet we, the people, have no right to complain after electing representatives to create those monopolizing sinecures."

Motch-Pot.

It seemeth that this word Motch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 257, 176 a.

Punch has the following definition of "Jury:" An assembly of twelve honest men, appointed to decide on disputes among their fellow-subjects. As the honest men are liable to be locked up without food or candle, when they cannot agree, it is sometimes customary to toss up or play at odd man, in order to arrive at a verdict. When the jury quarrel among themselves, it is usual to deprive them of coals, which, if given, would only be adding fuel to fire. Juries are of very ancient origin; but, in the present day, they are divided into two kinds — grand and petty. In order to prevent the latter from being actuated by petty feelings, they are liable to be challenged by either party. This challenging consists of calling them out of the box, when there is no chance of their giving satisfaction. Juries are empannelled, and challenging them is called going through the pannel; but as going through the pannel might open the door to injustice, no one but the sovereign is allowed to object to more than thirty-five, without assigning a good reason.

The French *Revue de Législation* for October, 1845, contains an account of a Report to the French Institute, by M. Berriat Saint-Prix, a venerable professor and jurist of great fame, on M. Alauzet's Treatise on the Law of Insurance. In the course of his Report the author refers to an analysis of this work, in an article in a "Law Journal, published in English at Boston, the *Law Reporter* of the month of June last, relative to the recent French works on Insurance, by Mr. Sedgwick, a distinguished publicist, whose labors we have already had the honor of bringing before you." He then presents several extracts from the article in question, which was written by one of our most valued correspondents, Mr. Theodore Sedgwick, of New York. We regret to see that the labors of M. Berriat Saint-Prix have been closed by death. He died eight days after reading the Report above-mentioned to the Institute.

A volume has been published in Cincinnati, by Derby, Bradley & Co., entitled "An Introduction to Equity Jurisprudence, on the basis of Story's Commentaries, with Notes and References to English and American Cases, adapted to the use of students, by James P. Halcombe." We understand that this volume is regarded as an infringement of Judge Story's Commentaries on Equity Jurisprudence, and that notice has been given of a motion for injunction to be heard at the next term of the Circuit Court of the United States, in Cincinnati, before Mr. Justice Maclean.

The Frankfort (Ky.) Commonwealth says: Judge Kinkead, of the 19th district, has performed a very handsome, and we are happy to hear, a very acceptable act, by the appointment of Mrs. Trimble, the accomplished and estimable lady of the late John Trimble, as clerk of the Carter circuit, in the place of her deceased husband.

We have seen a letter from abroad in which it is stated that the Hon. William Kent, of New York, now in Paris, has been appointed Dane Professor of Law in Harvard University. It was thought that he would accept the appointment.

Insolvents in Massachusetts for May.

Name of Insolvent.	Residence.	Occupation.	Master or Judge.	Commencement of Proceedings.
Alden, David,	Boston,	Merchant,	Bradford Sumner,	May 2.
Aldrich, Horatio,	Uxbridge,	Currier,	Henry Chapin,	" 2.
Amsden, Lee,	Dedham,	Wheelwright,	S. Leland,	" 12.
Arnold, William E.	Boston,	Gentleman,	Bradford Sumner,	" 19.
Ashcroft, Edward H.	Medford,	Calico Printer,	George W. Warren,	" 8.
Austin, Henry,	Boston,	Housewright,	Ellis Gray Loring,	" 20.
Ball, Charles,	West Springfield,	Farmer,	E. D. Beach,	" 23.
Bangs, J. F. F.	Boston,	Chair Painter,	Bradford Sumner,	" 20.
Bates, Moses, Jr.	Cambridge,	Machinist,	George W. Warren,	" 8.
Bigelow, Emerson,	Southboro',	Yeoman,	Benj. F. Thomas,	" 23.
Brown, Stephen B.	Adams,	Manufacturer,	P. L. Hall,	" 30.
Burlingame, Albert S.	Brighton,	Butcher,	George W. Warren,	" 22.
Chapman, Samuel,	Marblehead,	Shoemaker,	D. Roberts,	" 23.

Name of Insolvent.	Residence.	Occupation.	Master or Judge.	Commencement of Proceedings.
Chase, James T.	Swanzey,	Shoemaker,	C. J. Holmes,	May 27.
Chase, William D.	Boston,	Carpenter,	Bradford Sumner,	" 26.
Cobb, Luther,	Abington,	Trader,	W. Young,	" 21.
Colman, Ezekiel A.	Concord,	Paper Stainer,	Bradford Sumner,	" 1.
Colt, Gardner L.	Fall River,	Operative,	C. J. Holmes,	" 13.
Corliss, Joseph,	Boston,	Stone Cutter,	Ellis Gray Loring,	" 6.
Coy, Alonzo,	Boston,	Truckman,	Bradford Sumner,	" 8.
Crocker, Henry S.	Nantucket,	Trader,	G. Cobb,	" 30.
Dane, Hermon,	Medford,	Stone Layer,	George W. Warren,	" 9.
Davis, Thomas,	Dartmouth,	Cooper,	Oliver Prescott,	" 7.
Dean, Merrick S. P.	Rutland,	Shoe Manufacturer,	Chas. W. Hartshorn,	" 4.
Dermot, Thomas,	Blackstone,	Taylor,	Henry Chapin,	" 21.
Dixey, John E.	Boston,	Currier,	Bradford Sumner,	" 14.
Doolittle, Lucius,	Boston,	Innkeeper,	George S. Hillard,	" 1.
Duffey, Jamas,	Boston,	Laborer,	Bradford Sumner,	" 23.
Eager, James,	Charlestown,	Trader,	G. W. Warren,	" 25.
Feegan, James,	Georgetown,	Shoemaker,	E. Mosely,	" 5.
Fillebrown, James, Jr.	Boston,	Merchant Tailor,	Bradford Sumner,	" 16.
Foster, George,	Charlestown,	Broker,	G. W. Warren,	" 22.
Gallup, George G.	Boston,	Gentleman,	George S. Hillard,	" 15.
Ganlifer, John P.	Quincy,	Stone Cutter,	Nathaniel F. Safford,	" 4.
Gerrish, Lewis G.	Chelsea,	Carpenter,	Bradford Sumner,	" 1.
Giddings, Joshua,	Danvers,	Shoe Manufacturer,	John G. King,	" 30.
Goddard, William E.	Boston,	Furniture Dealer,	Bradford Sumner,	" 16.
Gore, Watson, Jr.	Boston,	Trader,	George S. Hillard,	" 1.
Green, Andrew,	Charlestown,	Weigher & Measurer,	George W. Warren,	" 2.
Harris, Elisha,	Adams,	Manufacturer,	P. L. Hall,	" 30.
Harris, Francis,	Shirley,	Carpenter & Farmer,	Bradford Russell,	" 12.
Hathaway, Stephen,	New Bedford,	Shipwright,	Oliver Prescott,	" 21.
Haynes, Sidney C.	Charlestown,	Trader,	George W. Warren,	" 21.
Hood, Benjamin L.	New Bedford,	Trader,	Oliver Prescott,	" 16.
Howe, Jones,	Roxbury,	Mason,	David A. Simmons,	" 2.
Hutchinson, Samuel K.	Lowell,	Manufacturer,	J. G. Abbott,	" 22.
Jones, Frederick H.	Boston,	Trader,	Bradford Sumner,	" 19.
Kelley, Benjamin,	Springfield,	Shoe Manufacturer,	E. D. Beach,	" 12.
Kenney, William J. C.	Danvers,	Shoe Manufacturer,	John G. King,	" 5.
Kettell, James, Jr.	Charlestown,	Clerk,	George W. Warren,	" 6.
Macomber, Perry R.	Fall River,	Trader,	C. J. Holmes,	" 29.
Marcy, James W.	Boston,	Counsellor at Law,	George S. Hillard,	" 8.
McNear, Christopher,	Boston,	Master Mariner,	George S. Hillard,	" 21.
McQuaid, John,	Boston,	Trader,	Bradford Sumner,	" 12.
Miller, Thomas,	Fall River,	Trader,	C. J. Holmes,	" 1.
Morse, James C.	Boston,	Gentleman,	Bradford Sumner,	" 13.
Nelson, Porter,	Warren,	Husbandman,	Chas. W. Hartshorn,	" 27.
Newcomb, Danforth I.	Weymouth,	Marketman,	S. Leland,	" 16.
Noyes, Ira,	Abington,	Trader,	W. Young,	" 21.
Noyes, John M. C.	Danvers,	Shoe Manufacturer,	John G. King,	" 5.
Nute, Josiah,	Roxbury,	Cordage Manufact'r,	S. Leland,	" 5.
Odiorne, Henry B.	Medford,	Calico Printer,	George W. Warren,	" 8.
Osgood, Isaac,	Barre,	Laborer,	W. A. Bryant,	" 13.
Page, Charles,	Danvers,	Brickmaker,	John G. King,	" 15.
Parker, Sylvanus,	Fairhaven,	Boat Builder,	Oliver Prescott,	" 12.
Phillips, Nathan M.	Boston,	Painter,	George S. Hillard,	" 27.
Pratt, William W.	Worcester,	Trader,	Isaac Davis,	" 13.
Ramsdell, Daniel S. Jr.	Lynn,	Shoe Manufacturer,	John G. King,	" 20.
Richardson, James M.	Attleborough,	Jeweller,	C. J. Holmes,	"
Ridgway, Anthony B.	Boston,	Merchant,	Bradford Sumner,	" 1.
Rogers, J. W. H.	Boston,	Painter,	George S. Hillard,	" 27.
Ruddock, David S.	Springfield,	Printer,	E. D. Beach,	" 11.
Sanger, Abner W.	Boston,	Trader,	Bradford Sumner,	" 25.
Sanford, Gd. (widow,)	Medway,		David A. Simmons,	" 30.
Savels, Asa M.	Boston,	Paper Hanger,	Bradford Sumner,	" 4.
Sawtell, Abel,	Groton,	Stone Cutter,	B. Russell,	" 12.
Sawyer, Oliver T.	Boston,	Mason,	Bradford Sumner,	" 22.
Sawyer, William B.	Charlestown,	Merchant,	George S. Hillard,	" 8.
Spring, John R.	Newburyport,	Merchant,	E. Mosely,	" 23.
Smith, John H.	Boston,	Merchant Tailor,	Bradford Sumner,	" 16.
Smith, Oliver,	New Bedford,	Shipwright,	Oliver Prescott,	" 29.
Smith, William H.	Springfield,	Printer,	E. D. Beach,	" 20.
Soule, William,	New Bedford,	Coachman,	Oliver Prescott,	" 20.
Stockman, John,	Roxbury,	Builder,	D. A. Simmons,	" 12.
Storey, Samuel,	Essex,	Shoe Manufacturer,	John G. King,	" 30.
Swift, Daniel,	Falmouth,	Blacksmith,	N. Marston,	" 11.
Swift, Seth,	Falmouth,	Blacksmith,	N. Marston,	" 11.
Tebbetts, Horace B.	Boston,	Merchant,	Ellis Gray Loring,	" 13.
Thayer, Erastus,	Braintree,	Bootmaker,	S. Leland,	" 30.
Tillson, Zebina,	Ware,	Carpenter,	L. Marcy.	" 5.
Walsh, George,	Charlestown,	Housewright,	George W. Warren,	" 23.
Wilmarth, Arthur F.	Adams,	Manufacturer,	I. L. Hall,	" 30.